FILED

96 604 OCT 11 1996

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No. _____

In the

Supreme Court of the United States

October Term, 1996

Special School District No. 1,

Petitioner,

v.

H.M.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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261 pp

QUESTION PRESENTED

Whether a school district has an obligation to provide a local due process hearing requested pursuant to the federal Individuals with Disabilities Education Act "IDEA", 20 U.S.C. § 1400 et seq.,to a student for whom the school district is no longer responsible for the provision of special education services?

PARTIES TO THE PROCEEDING BELOW

H.M., a minor

Special School District No. 1

The Minnesota State Board of Education

The Commissioner of the Minnesota Department of Education

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Special School District No. 1 respectfully petitions for a writ of certiorari to review the judgment of the Minnesota Court of Appeals in this case.

OPINIONS BELOW

Special School District No. 1 was dismissed from the local due process hearing requested by H.M. by an administrative law judge. The order was issued on August 15, 1995. The decision is an unpublished administrative decision cited as In the Matter of H.M., OAH No. 69-2104-9817-3 (August 15, 1995) (App. A-27).

A hearing review officer for the Minnesota Department Education affirmed the decision of the administrative law judge. The decision of the Minnesota Department of Education was issued on September 20, 1995. The decision is an unpublished administrative decision cited as In the Matter of H.M., OAH No. 69-2104-9817-3 (September 20, 1995). (App. A-36).

The Minnesota Court of Appeals reversed the decision of the Minnesota Department of Education. The Court of Appeals decision was filed on May 14, 1996 and is an unreported decision which is cited as In the matter of: H.M. vs. Special School District No. 1 and Commissioner of Children, Families and Learning, C7-95-2204 (Minn. App. May 14, 1996)(App. A-61).

The order of the Minnesota Supreme Court denying the Special School District's Petition for Review was issued on July 10, 1996. (App. A-76). The Appellate Court entered Judgment on September 10, 1996.(App. A-76)

JURISDICTION

The Minnesota Court of Appeals filed its decision on May 14, 1996. The Minnesota Supreme Court declined to exercise

its discretion to review the case on July 10, 1996. Judgment was entered on September 10, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

1. The Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. § § 1400 et seq (1989 & Supp 1996)

2. 34 Code of Federal Regulations Part 300 (1995)

3. Minnesota Statute § 120.17 (1994 & Supp. 1995)

4. Minnesota Rules Chapter 3525 (1995)

The text of relevant portions of the above statutes and rules is provided in the Appendix (App. A-129–A-223).

STATEMENT

Respondent H.M. (Hereinafter "Student") is a disabled student entitled to receive special education and related services pursuant to the IDEA. The Student first enrolled in Petitioner Special School District No. 1 (Hereinafter "Special School District") in January 1991. The Student attended school in the Special School District on an intermittent basis between 1991 and May of 1995. The Special School District provided him with special education and related services during the period of time he was enrolled in the District. He did not request a local due process hearing during the period of his enrollment in the Special School District.

In May of 1995, as a result of some type of criminal behavior about which the Special School District was not provided information, the Student was incarcerated in a

Minnesota Juvenile Correctional Facility in Red Wing Minnesota. Red Wing is outside of the geographical boundary of the Special School District. Pursuant to Minnesota law, once the student was incarcerated in the Minnesota Correctional Facility, the Department of Corrections became the public entity responsible for providing the student with special education and related services. Minnesota Rule 3525.2325, Subp. 1(D) (1995) provides that the Minnesota Department of Corrections is the "school district" responsible for providing a special public education to incarcerated students.

On May 3, 1995, the Student's attorney wrote the Minnesota Department of Education, the Anoka School District (the Student had recently been committed by the juvenile court to the Second Chance Ranch located within the Anoka School District) and Special School District No. 1. The Student's attorney stated that the Student had been committed to the Red Wing Correctional Facility the previous day. She asked the Department of Education to inform her which school district was responsible for Student's education during his incarceration. She also asked that the Student be provided a conciliation conference to settle concerns he had concerning the substance of the special educational program he had been provided by the Special School District.

On May 15, 1995, Robert Wedl, Assistant Commissioner of the Minnesota Department of Education sent the attorney a letter informing her that, under Minnesota Rule 3525.2325, Subpart 1 (1995), the Minnesota Department of Corrections would be considered the Student's school district for purposes of special education during the period of time he was incarcerated in the Minnesota Correctional Facility at Red Wing.

On June 7, 1995, the Student, through his parents, requested a local due process hearing. The hearing was requested from both the Department of Corrections and the

Special School District. Impartial due process hearings are authorized by IDEA for the purposes of permitting the parents and guardians of disabled students to address their complaints regarding their child's identification, evaluation or educational placement or the provision of a free appropriate public education (FAPE) to their child. 20 U.S.C. § 1415 (1989 & Supp. 1996).

Because the Special School District was no longer the entity responsible for providing special education to the Student, it brought a motion seeking its dismissal from the hearing due to lack of jurisdiction. The administrative law judge presiding as the hearing officer bifurcated the hearing. The local due process hearing went forward with the Department of Corrections on July 19, 1995. On August 15, 1995 the hearing officer ruled on the Special School District's motion to dismiss. He found that the Special School District had no obligation to provide a local due process hearing to a former student for whom it no longer had the responsibility to provide FAPE. Accordingly, the Student's hearing with the Special School District was dismissed.

The Student appealed the Special School District's dismissal of the local due process hearing for lack of jurisdiction to the Minnesota Department of Education (now the Department of Children, Families and Learning). The Minnesota Department of Education is the agency with the responsibility to implement and interpret IDEA and state special education law. The Department of Education appointed a state level hearing review officer to hear the appeal. On September 20, 1995 the hearing review officer affirmed the decision dismissing the Special School District from the hearing.

On October 16, 1995 the Student appealed again, this time through a writ of certiorari to the Minnesota Court of Appeals. The Student named the Special School District, the Commissioner of the Minnesota Department of Education, and

the Minnesota State Board of Education as Respondents. The Student asserted that he had a right to a local due process hearing pursuant to the federal IDEA from the Special School District to address complaints regarding his prior program of education in the Special School District. He asserted that the dismissal of the Special School District from the hearing deprived him of his right to due process. This is notwithstanding the fact that subsequent to his hearing request the Student was afforded a local due process hearing from the Department of Corrections, his current school district of residence.

During the period of time that the case was pending before the Court of Appeals, the Student was released from the Minnesota Juvenile Correctional Facility and returned to the Special School District. The Court of Appeals requested additional briefing on the issue of whether the case was moot. The Court of Appeals found that the case could go forward because it was capable of repetition yet evading review. On May 14, 1996, the Court of Appeals went on to reverse the decision of the Department of Education, and remand the case for a due process hearing between the Student and the Special School District.[1] The State Board of Education was

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[1] Although this case has been remanded to the administrative agency for a hearing, the decision of the Court of Appeals is final as to the issue presented herein. The issue is whether a former school district is required to provide an IDEA due process hearing to a former student. This issue will be lost if the Supreme Court does not review the decision now. Pursuant to the Court of Appeals decision, the Special School District must provide the student a hearing. The case has been remanded for such a hearing. Once a hearing is provided, the question becomes moot and the Special School District will have borne the full effects of a hearing. Under such circumstances, the requirement of finality is satisfied. See, Cox Broadcasting Corp v. Cohn, 420 U.S. 469, 476-487 (1975); Matthews v. Eldridge, 424 U.S. 319, 331 n. 11 (1976). The issue of whether a past school district has a responsibility to provide a hearing to a student for whom another school district is responsible is a separable and independent issue from the merits of the case. The requirement of

dismissed. The Court of Appeals acknowledged that the Department of Corrections was the local educational agency responsible for providing special education to the Student at the time that the hearing was requested. Despite this acknowledgment, the Court found that the Student's request for compensatory education permitted the hearing to go forward against the Special School District. The Court of Appeals decision permits students to request hearings from former school districts whenever compensatory education is sought as a remedy for a prior deprivation of FAPE under IDEA.

The Special School District submitted a Petition for Review to the Minnesota Supreme Court. On July 10, 1996 the Minnesota Supreme Court declined to exercise its discretion to review the case. Judgment was entered on September 10, 1996.

REASONS FOR GRANTING THE PETITION

I. The Minnesota Court of Appeals Decision is Erroneous.

In holding that the Special School District is required to provide a local due process hearing to the Student, the Court of Appeals fundamentally misinterpreted the IDEA and its implementing state law. The error in the Court of Appeals' interpretation of IDEA warrants Supreme Court review.

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finality should not be construed to cause "crucial collateral claims to be lost and potentially irreparable injuries to be suffered". Matthews v. Eldridge, 424 U.S. 319, 331 n. 11 (1976). Further, the legal and practical value of the issue will be destroyed if it is not determined now. Simply stated, the requirement of finality does not preclude Supreme Court review because the issue will be forever lost if the Court of Appeals decision is not corrected immediately.

A. The Court of Appeals Misunderstood the Purpose and Scope of Local Due Process Hearings Requested Pursuant to IDEA.

The Court of Appeals concluded that the Student was entitled to a due process hearing from both the School District and the Department of Corrections, despite the fact that only the Department of Corrections had present responsibility for the Student's program of special education.[2] The Court of Appeals decision represents a flawed understanding of the IDEA and its implementing regulations.

Both federal and Minnesota regulations implementing IDEA refer only to the obligation of a school district to

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[2] The Student was paroled from the Minnesota Juvenile Correctional Facility while the case was pending before the Court of Appeals. The Student is now reenrolled in the Special School District. Although the Special School District once again has responsibility to provide special education to the Student, the Court of Appeals determined that the case was not moot. (App. A-61) In seeking U.S. Supreme Court review, the Special School District wishes to reassert that the matter is not moot. This is a case that is capable of repetition yet evading review. Honig v. Doe, 484 U.S. 305 (1988). Between 1991 and the present the Student's enrollment in the district has been sporadic. It is quite likely that he will again change school districts, thus renewing the issue of whether more than one school district is required to provide a due process hearing. In addition, the case is not moot because the case has been remanded for a hearing on the issue of whether the student is entitled to compensatory education for a prior period of enrollment in the school district. Therefore, the issue survives. The Student currently has two due process hearings pending against the Special School District. The first is the hearing he requested while he was the responsibility of the Department of Corrections. The second is one that he has requested since returning to the Special School District. This is entirely outside the scope of IDEA. The hearing requested while the Student was the responsibility of another "school district" continues to raise an important federal question which has not become moot through the student's return to the Special School District.

provide a due process hearing to a student for whom it has current responsibility for the provision of special education. See 34 C.F.R. §§ 300.504-506 (1995); Minn. R. §§ 3525.3300-3900 (1995). There is absolutely no reference within these laws to support a continuing obligation between a school district and a former student who is currently receiving special education from another school district.

In order to fully illustrate the relative responsibilities of school districts to provide disabled students and their parents local due process hearings pursuant to IDEA, it is necessary to briefly review the relevant statutes. The IDEA was enacted to ensure that children with disabilities receive a free appropriate public education (FAPE) which emphasizes special education and related services designed to meet the unique needs of qualified disabled students. 20 U.S.C. § 1400(c) (1989 & Supp. 1996). Both federal and state regulations implementing IDEA provide that the purpose of a local due process hearing is to resolve differences existing between a parent and a provider school district concerning either a disabled student's present or proposed educational placement or program of education. 34 C.F.R. §§ 300.504-506 (1995); Minn. R. §§ 3525.3300-3900 (1995). Specifically, the federal rules implementing IDEA clarify that a due process hearing may be requested whenever a school district (1) proposes to initiate or change the identification, evaluation or educational placement of a child or the provision of FAPE to a child; or (2) refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. 34 C.F.R. Sec. 300.506 (1995). Similarly, in Minnesota due process hearings are conducted for the purpose of addressing *proposed* action. Minn. Stat. § 120.17 (1994 & Supp. 1995) (emphasis added).

Under the federal IDEA, state and local education agencies are the entities charged with the responsibility for implementing the provisions of the law. 20 U.S.C. §§

1412(2); 1412(5); 1415(b)(2) (1989 & Supp. 1996). This obligation includes the responsibility to provide parents their IDEA procedural safeguards and to assure that all disabled students within their jurisdiction are provided FAPE. Id. Pursuant to IDEA any due process hearing that is requested is to be conducted by the State Educational Agency or the public agency directly responsible for the education of the child *as determined by state law*. Id (emphasis added). A state is not required to implement IDEA in any specific procedural format. A state's only obligation under the law is to ensure that the procedures it has developed to implement IDEA meet the minimum standards of the law. Township High Sch. Dist. No. 211 Cook County v. Mrs. V., C 74 92, 94 C 30; 22 IDELR 433 (N.D. Ill. 1995). The states have the freedom to determine which public entities will be responsible for having administrative control over schools and for providing students with FAPE.

In Minnesota, only one school district at a time is responsible for providing special education (both services and procedural rights). Minn. Stat. § 120.17 (1994 & Supp. 1995). Minnesota state law implementing the IDEA requires that a due process hearing is to be provided by and in the school district responsible for providing a student an appropriate program of education is provided. Minn. Stat. § 120.17, Subd. 3b(e) (1994 & Supp. 1995). Minn. Stat. § 120.17 (1994 & Supp 1995) and Minn. R. Chapter 3525 (1995) provide several options as to how one is to determine in which school district a student "resides" for purposes of IDEA. Relevant to the situation presented in this case, Minn. R. 3525. 2325, Subd.1(D) (1995) explains that the legal school district of residence for a student incarcerated in a correctional facility run by the Minnesota Department of Corrections is the Department of Corrections. The rule provides that, as such, the Department is the entity responsible for providing FAPE and all attendant due process rights to

incarcerated students. Minn. Stat. § 120.17, Subd.7 (1994 & Supp. 1995); Minn. R. 3525.2325 1(D) (1995).

The law identifying a disabled student's school district of residence is consistent with the well-accepted principle that an individual can only have one residence at a time for purposes of the law.[3] Therefore, regardless of whether a student was previously served by other school districts, only one school district at any given time can be considered a student's "school district of residence" under IDEA. See Lapp v. Reeder Public Sch. Dist. No. 3, 491 N.W.2d 65; 19 IDELR 468 (N.D. 1992) (in which the North Dakota Supreme Court stated that for purposes of determining an obligation of compliance under IDEA, a student could be found to reside in only one school district at any given time).

The Minnesota Court of Appeals conceded in H.M. that the Department of Corrections was the "school district" with present responsibility to provide FAPE. Despite this, the Court incongruously determined that the student's request for compensatory education permitted the hearing to go forward against the student's former school district. [4] In specific, in the course of its decision, the Minnesota Court of Appeals acknowledged that the Department of Corrections was the school district with responsibility to provide FAPE to students incarcerated within its correctional facilities. Nevertheless, the Court went on to note, almost as an afterthought, that the "district of residence" is the school district in which the parents reside. The Court's conclusions are internally inconsistent. Pursuant to Minnesota Rule 3525.2325, Subp.

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[3] Both Minnesota and federal law are replete with examples of this rule of law. See e.g., Minn. Const. Art. 7 §§ 1, 2 (setting out residency requirements for Minnesota voters and clearly indicating that an individual can only legally "reside" in one district at a time).

[4] The issue of compensatory education will be addressed in the next portion of this section.

1(D) (1995), the Department of Corrections becomes the "district of residence" for an incarcerated student. There cannot be two districts of residence with primary responsibility for only one student's education.

Case law supports this analysis. In Wakefield Public Sch., a hearing officer determined that a school district's obligation to provide a disabled student FAPE ceased when his parents had moved to an adjoining school district. In upholding the previous school district's refusal to continue to educate the student, the hearing officer cited state residency requirements similar to those found in Minn. Stat. § 120.17 and stated that "the [r]esponsibility for the provision of appropriate special education services rests solely with the school district where [the student and his parents] currently reside." In so holding, the hearing officer recognized that the previous school district would not again be obligated to provide the disabled student FAPE unless and until his parents chose to move back within the bounds of that school district. Wakefield Public Sch., 20 IDELR 592 (October 15, 1993) (emphasis added); See also, Memorandum Opinion and Order of United States District Judge Davis, March 23, 1995 (in which a Minnesota federal District Court determined that the school district in which a disabled student's parents currently reside is the school district responsible for providing the student with the due process required under IDEA, even if the student himself lived within the bounds of another school district when the request for the due process hearing was made from the latter district); Gerasimou v. Ambach, 636 F.Supp. 1504 (E.D.N.Y. 1986) (in which a federal district court ruled that a parent's challenge to the educational placement of her twin sons was moot against a school district in which she no longer resided).

Similarly, in Monahan v. State of Nebraska, 687 F.2d 1164 (8th Cir. 1982) *cert. denied*, 460 U.S. 1012 (1982), the Eighth Circuit Court of Appeals also held that a non-resident student's IDEA claim was moot on the ground that the

student no longer resided within the boundaries of the school district at the time that she made her claim[5]. The fact that the student asserted that she planned to move back into the school district and to resume her education there did not change the Court's ruling. The Court held that unless and until the student actually moved back into the bounds of the district so as to be eligible to receive educational services in the district, any claim brought against that school district regarding the student's proper educational placement would be speculative and not ripe for adjudication. Id. See also In re: a Child with Disabilities, 21 IDELR 746 (March 15, 1994) (in which a Connecticut hearing officer dismissed an IDEA local due process hearing through which a student attempted to obtain compensatory education from a school district on the grounds that she was no longer a resident of the school district.)

Due process hearings are crafted to permit students to resolve disputes with the school district presently responsible for providing special education and related services. There is no authority permitting a student to seek a hearing from both a past and a present school district.

B. A Request for Compensatory Education Does Not Expand the Number of School Districts That May Be Joined to a Local Due Process Hearing.

Although the Court of Appeals conceded that the Department of Corrections was the "school district" with current responsibility to provide special education to the

[5] It is relevant to note that the student in Monahan had reached the age of majority and had married at the time this suit was initiated. Under relevant state law, the student's minority ended at the time of her marriage. Thus, the Court appropriately determined that the residence of the student's parents was no longer relevant to the question of which "school district of residence" was responsible for the student's education under IDEA.

Student, it went on to find that the Student's request for compensatory education allowed the hearing to go forward against the Special School District. This ruling is in error.

Although not expressly authorized under IDEA, courts interpreting this obligation have sometimes awarded compensatory education, or "belated FAPE" to a student. Compensatory education is a remedy by which a school district currently responsible for the student's education is ordered to provide additional education to offset the effect of a past educational failure. Lester H. v. Gilhool, 916 F.2d 865, 872 (3rd Cir.1990). Compensatory education is not like a damage or a contractual remedy for educational malpractice which immediately inures to a student to whom a school has failed to provide FAPE. Rather, compensatory education is a remedy which must focus on a student's individual needs and be awarded in response and in relation to those needs as part of a student's individual educational program. Despite the availability of compensatory education, the administrative procedures of IDEA cannot be compromised by allowing more than one school district to be subject to joinder at hearing. To hold otherwise would be contrary to the purposes of the IDEA.

In holding that students are entitled to seek hearings from former school districts when pursuing compensatory education, the Court of Appeals erroneously relied on the cases of Miener v. Missouri, 800 F.2d 749 (8th Cir. 1986); Frith v. Galeton Area Sch. Dist., 900 F.Supp. 706, 719 (M.D.Pa. 1995); Gerasimou v. Ambach, 636 F.Supp. 1504, 1511 (E.D.N.Y. 1986) and Lester H. v. Gilhool, 916 F.2d 865 (3rd Cir. 1990), cert denied, 499 U.S. 923 (1991). These cases do not stand for the proposition that a student may bring a local due process hearing against a school district when a second school district has already taken over the responsibility to provide FAPE to the student. In none of these cases did the student seek a local due process hearing from a former

district while that student was enrolled in another responsible district. In fact, the Gerasimou case makes it clear that a change in school district will moot all placement issues. Gerasimou at 1511. In Gerasimou the issue was of tuition reimbursement and the due process hearing was initiated against only one school district, at a time when the students were actually enrolled in that school district. Frith is the only case in which two school districts were involved, but the case is not instructive as it is in the context of federal litigation and not a hearing request, and the Court does not directly address the extent to which a change in school district will moot a hearing request. Further, Frith arises out of Pennsylvania, and the instant case depends on an interpretation of Minnesota law.

In its opinion the Court of Appeals stated that the cases cited by the School District and the Hearing Review Officer for the proposition that a student cannot seek a due process hearing from a former district of residence did not address the matter in the context of a request for compensatory education. This is an insufficient basis for disregarding the holdings in these cases. All of the cases cited clearly stand for the position that once the responsibility to provide FAPE ceases or shifts to another district, the student may no longer pursue a local due process hearing from the prior district. This is true regardless of whether compensatory education is sought.

Although the U.S. Supreme Court has never issued an opinion considering the availability of compensatory education, it has issued opinions with regard to reimbursement. Compensatory education is generally considered the "poor man's Burlington."[6] Deborah A.

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[6] "Poor man's Burlington" refers to the U.S. Supreme Court's decision in Burlington School Comm. v. Mass. Dept. Of Educ., 105 S.Ct. 1996 (1985) which provides for private school tuition reimbursement for special education students that are denied FAPE. Compensatory

Mattison, Stewart R. Hakola, *The Availability of Damages and Equitable Remedies under the IDEA, Section 504, and 42 U.S.C. Section 1983*, Individuals with Disabilities Education Law Report (L.R.P. Pub. 1992). Therefore, it is useful to look to Supreme Court decisions relating to reimbursement. Previous cases arising out of the Supreme Court have always started from the premise that a due process hearing can only be requested from one school district and may only address "proposed" alterations to a student's educational program. In the case of Burlington Sch. Comm. v. Mass. Dept. Of Educ., 471 U.S. 359, 105 S.Ct. 1996 (1985) the Court had an opportunity to rule on the permissibility of reimbursement of private school tuition as a remedy for a denial of FAPE. In this case it was clear that the due process hearing was requested from only one district, at a time during which the school district had current responsibility to provide the student with FAPE. In its opinion the Court specifically described IDEA's due process procedures as follows: "These procedures include the right of the parents to participate in the development of an "individualized education program" (IEP) for the child and to challenge in administrative and court proceedings a *proposed* IEP with which they disagree." Id at 361 (emphasis added); See also Florence County Sch. Dist. Four v. Carter, 114 S.Ct. 361 (1993).

The Minnesota Court of Appeals has delivered an opinion that represents an erroneous interpretation of a student's right to a due process hearing pursuant to the IDEA and Minnesota law. For this reason, the U.S. Supreme Court should exercise its power to review the case.

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education is the counterpart of tuition reimbursement for students that are unable to afford private school.

II. The Minnesota Court of Appeals Decision Conflicts with the Law of the Eighth Circuit Court of Appeals and Federal District Courts.

Supreme Court review is necessary to resolve the clash of decisions regarding the obligation of a school district to provide a due process hearing to a former student pursuant to IDEA. The decision rendered by the Minnesota Court of Appeals is in direct conflict with the law of the 8th Circuit Court of Appeals, as well as with other inferior tribunals.

The concept that a former school district is not required to provide an IDEA local due process hearing to a former student was established in the Eighth Circuit Court of Appeals case of Monahan v. State of Nebraska, 687 F.2d 1164 (8th Cir. 1982). As discussed in the preceding section, Monahan held that a nonresident student's IDEA claim was moot against a school district on the grounds that the student resided outside the boundaries of the school district at the time that she made her claim. The fact that the student asserted that she planned to move back into the school district and resume her education there did not change the Court's ruling. The Court explained that the question of whether the student would eventually move back to the school district and resume her education was speculative. Accordingly, the Court held that until the student moved back into the bounds of the district, any claim brought against that school district regarding the student's proper educational placement would not be ripe for adjudication. Monahan is in clear conflict with the decision of the Minnesota Court of Appeals. In the absence of Supreme Court review, the lack of clarity inherent in the law will continue to result in expensive and time-consuming litigation over the issue presented herein.[7]

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[7] Although the Court of Appeals decision is an unpublished decision, it is being widely used by legal practitioners in the area of special education. The decision is reported in the Individuals with

The Minnesota Court of Appeals attempted to distinguish Monahan by asserting that Monahan did not address a claim for compensatory education. As discussed in the preceding section, this is a spurious basis for distinguishing between the cases. This is evidenced by the fact that since the issuance of the Minnesota Court of Appeals decision in H.M., two federal district courts have expressly disavowed its holding. See Thompson v. Special Sch. Dist. No. 1, 3-95-1083 (D. Minn. Filed July 31, 1996)(App. A-86) and Smith v. Special Sch. Dist. No.1, 4-96-685 (D.Minn. Filed August 12, 1996)(App. A-96). Each of these decisions specifically references the Minnesota Court of Appeal's decision in a manner which supports the Special School District's conclusion that the decision is legally unsound. Each of these cases considers the issue in the context of a request for compensatory education.

In Thompson v. Special Sch. Dist. No. 1, 3-95-1083) (D. Minn. filed July 31, 1996), the district court upheld a state-level hearing review officer's determination that a school district had no obligation to provide a local due process hearing to a former student who was currently attending a charter school, but was seeking compensatory education from the former school district. The court held that IDEA does not create the right to bring a claim which seeks damages arising out of an alleged past denial of a free appropriate public education by a school district formerly responsible for a disabled child's education. The Thompson court considered such a claim to be analogous to an "educational malpractice" claim. Observing that educational malpractice claims are not anticipated by the passage of IDEA, the court dismissed the

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Disabilities Education Law Reporter at 24 IDELR 159 (LRP Pub. 1996). This is the publication which catalogs and reports all special education decisions across the country. The decisions reported in this publication are commonly cited without regard to a court's designation of a particular case as unpublished.

student's claims. In reaching its conclusion, the Thompson court specifically rejected the student's claim that the Minnesota Court of Appeals' decision in H.M. established a right to a hearing on "retroactive services." The court observed that the H.M. decision was unpersuasive as it offered no legal authority to support its conclusion.

Shortly after the Thompson decision was filed, another Minnesota federal court joined the Thompson court in its rejection of the H.M. decision. See Smith v. Special Sch. Dist. No. 1, 4-96-685 (D. Minn. filed Aug. 12, 1996). In a significant decision, the Smith court adopted a 30-day appeal period for IDEA claims and dismissed the student's case as time-barred. Although it dismissed the student's IDEA claims on that ground, the Smith court also noted that the student's claims would be subject to dismissal because the student was not a resident of the school district when he made his hearing request and claim for compensatory education. The court observed that the hearing request was not made to challenge any proposed action by the district but instead was aimed at allegedly deficient services previously provided. The court concluded that this type of complaint is not covered by Minn. Stat. 120.17, Subd. 3b(e) (1994 & Supp. 1995) which provides parents, guardians and school districts the right to request a local due process hearing on "proposed" actions relating to the student's program of education. In rejecting the student's claim for a hearing to challenge his past program of education, the Smith court specifically noted that it concurred with the Thompson court's finding that H.M. is unpersuasive.

Both of the federal district court cases cited above affirm administrative determinations by the State Department of Education that local due process hearings may not be required of former school districts. The decisions accord deference to the expertise of the Department of Education in the area of local due process hearings afforded by the IDEA. This is in keeping with the statutory authorization of IDEA granting

State Educational Agencies (SEAs) authority to determine the proper procedures for complying with IDEA's mandate regarding due process hearings. 20 U.S.C. § 1415 (1989 & Supp. 1996). Unlike the federal district courts, the Court of Appeals decision eschews the authority and expertise of the Minnesota Department of Education. The clear conflict between the Minnesota Court of Appeals decision in H.M. and the Eighth Circuit Court of Appeals decision in Monahan supports Supreme Court review. This is emphasized by express disavowance of the H.M. decision in subsequent federal district court opinions. Further, the conflict is aggravated by the polar interpretations given the issue by the Minnesota Department of Education and the Minnesota Court of Appeals. The cumulative effect of these decisions leaves the issue one which is obscured. Without Supreme Court guidance on the matter, the litigation between former school districts and disgruntled former special education students will continue.

III. The Question Presented Is Important.

The Court of Appeals decision greatly expands the scope of local due process hearings pursuant to IDEA. The result is an added weight to the already heavy administrative and fiscal burden on school districts of providing special education. Under the interpretation of IDEA utilized by the Minnesota Court of Appeals, each time a student seeks compensatory education, the student could seek to join at hearing every past school district in which the student was enrolled at some point in the student's educational past. This is not what IDEA was intended to do. Such a system will operate in a manner which benefits no one. Therefore, the case presented to the Court in this Petition is an important one, addressing an important federal question. The case merits Supreme Court Review.

A. The Purpose of IDEA Is Compromised by the Court of Appeals' Decision.

The IDEA was enacted to ensure that disabled students receive FAPE, and to relieve the fiscal burden of educating disabled students placed upon the states and localities. 20 U.S.C. § 1400 (1989 & Supp 1996); 121 Cong.Rec.S. 37417(daily ed. Nov. 19, 1975)(statement of Sen. Schweiker). It places a premium on efficiency and speed. Amann v Town of Stow, 991 F.2d 929,931 (1st Cir. 1993). Mediation and compromise are encouraged. The efficiency of the IDEA administrative process will be severely undermined if past school districts are allowed to be joined in hearings requested by former students.

Prior to the Court of Appeals ruling, it has always been the current school district with responsibility to provide FAPE that must compensate its disabled students for past failures and provide all due process. This was the case regardless of whether students' past failures were the result of the mistakes of a prior district. Such an approach to the IDEA insures that students receive FAPE in the most efficient manner possible. If a student is permitted to join at hearing every past district of residence in which the student ever attended in order to determine which district is to blame, the result will be a logistical and administrative nightmare. School districts will assume an adversarial posture against each other and the result will be lengthy legal maneuvering to avoid blame. This will subvert IDEA's goal of the efficient provision of FAPE, and neither students nor school districts will benefit. Although the Student prevailed before the Minnesota Court of Appeals, the decision represents a pyrrhic victory for special education students.

The requirement that each school district of residence provide a student with FAPE in his or her current individual educational program carries with it the obligation to assess

and take into account the effects of past educational programs, whether they were appropriate or not. This is a factor that is inherent in IDEA's requirement that school districts provide students educational programs based on their current individual needs. In Minnesota, this is referred to as a student's "present level of performance." Minn. R. Chapter 3525 (1995). A student's individual needs reflect all the education, appropriate or inappropriate, that he has previously received. This obligation remains the same even if a student has been ineffectively served by a previous school district.

IDEA is not a fault-based statute which permits a school district to ponder the causal factors contributing to a student's educational needs. IDEA obligates a student's school district of residence to accept and serve its students "as it finds them" without regard to cause and without regard to the severity of a student's disability. This is true even under the scenario where a student's special education needs were neglected in a previous school district and therefore may be greater than they may have been under different circumstances. It would be absurd if a responsible school district were to evaluate a student and find that although a student had certain needs, it would not provide for them because the severity of the student's needs was as a result of another school district's failures. For example, if a student was unable to perform long division because a prior district failed to teach it, the current district could not simply decline to teach long division. Similarly, it makes little sense to join more than one school district to a due process hearing. It is the responsibility of the current school district to meet the special education needs of a student, however these needs were manufactured. The law simply does not create a mechanism which allows a student's current school district to assign responsibility to other school districts for a student's current educational needs. Nor, does the law give a student the power to choose the school district that will be held responsible for providing him or her FAPE.

The idea that a student's former school district could directly provide him or her compensatory education is educationally inconsistent with IDEA. As explained previously, compensatory education is simply a part of FAPE. Thus, it cannot be provided to students in discreet packages that are separate from the student's special education program. To the contrary, as part of the education provided a student under IDEA, compensatory education must blend into and augment a student's current program of education. This means that compensatory education must be consistent with the student's individualized special education goals and objectives. In order for a school district to provide compensatory education to a student in a manner which is appropriate and consistent with IDEA, it can only be provided by a student's current IEP team in the student's school district of residence. The provision of compensatory education outside the IEP process would violate the basic structure of IDEA and would result in a denial of FAPE.

Stated simply, public education is a cumulative process. To force education into insular components with quantifiable portions of blame for denied FAPE will only insure that students will spend months trying to receive the public education to which they are entitled. Such a result is contrary to conventional and legislative wisdom.

An interpretation of IDEA which permits all prior school districts to be joined in a due process hearing will serve the needs of no one and will preclude the realization of the goals of IDEA. As stated above, IDEA was enacted to ensure the prompt and efficient provision of special education to deserving students. The needless complication and protraction of the due process hearing structure will draw out the period of time during which a student seeks relief through the hearing process. When a student disputes his or her program of special education through a due process hearing, that dispute will receive no better resolution thought the joining of multiple

school districts. The student will, however, guarantee him or herself a more complex and protracted hearing.

B. The H.M. Decision Will Result in a Heavy Administrative and Fiscal Burden on School Districts.

The decision of the Court of Appeals comes at a time in which Congress is contemplating ways of decreasing the litigiousness that has developed in special education law. S. 1578, 104th Congress (1996); See also, Melinda Maloney, Brian Shenker, *The Continuing Evolution of Special Education Law 1978 to 1995*, Individuals with Disabilities Education Law Report, Special Report No. 2, (LRP Publications 1995)(special education litigation has exploded in recent years). The Court of Appeals decision will have the effect of increasing litigation.

In its decision the Minnesota Court of Appeals acknowledges the impact of its decision on local due process hearing procedure. This acknowledgment is made on the last page of the opinion through the following language: "We have not arrived at our decision without difficulty. We are fully aware of the expense and time involved in conducting and participating in a due process hearing." (App. A-61). Despite this acknowledgment, the Court of Appeals went forward with a decision which has the effect of expanding the already overwhelming nature of local due process hearings.

In the mobile world of the 1990's, it is common for students to be educated in more than one school district. Indeed, students often move between districts several times throughout the course of their K-12 academic experience. Defending cases brought by students who last attended a school district months or years previously will be virtually impossible. Records may be difficult to locate and there may

be no staff who have current knowledge of the student to serve as witnesses.

IDEA also does not provide a mechanism through which a former student's current school district could seek redress from a school district which has previously served the student. The ramifications of such a mechanism are alarming. In many cases, students have moved with their families several times within and outside the state. Every school district that has served a student arguably has affected him or her in some way. If a student's former school districts could be held financially responsible based on the student's former enrollment in the school district, a student's current responsible school district would have the legally enforceable right to seek contribution from every district that has previously served a student. In some circumstances this might mean that a school district would be able to seek contribution from a student's former school district in another state. This outcome stretches the administrative due process hearing structure to the breaking point. Such a mechanism is needlessly complicated, administratively burdensome and is obstructive to IDEA's goal of providing students special education and related services which meet their individualized needs.

The importance and impact of the issue can be demonstrated clearly just by a consideration of the specific experience of the Special School District. The Special School District is an urban district with a high number of transient students. Students in the District are constantly relocating in and out of the district. If the Special School District were required to provide a local due process hearing to each student that at some point in the past received special education services from the District, the cost to the Special School District would be astounding. This fact is proved through reference to the two district court cases cited in the preceding section of this Petition. Both of the cases arose out of the request of a former student for a due process hearing from the

Special School District. Both cases were reviewed by a hearing officer, a hearing review officer and a district court judge. These two cases, coupled with the instant case, have already been a significant drain on the resources of the Special School District. Without Supreme Court guidance the drain will continue for school districts across the country.

In the case of Florence County Sch. Dist. Four v. Carter, 114 S.Ct. 361, 366 (1993) the Supreme Court dealt with the administrative burden placed on school districts by the IDEA. In this case the school district that was a party to the case was objecting to the cost of providing tuition reimbursement to a student who was unilaterally placed in an unapproved private placement. The Supreme Court stated:

> There is no doubt that Congress has imposed a significant burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.

Id.

The Supreme Court's advice does not apply in the present case. The cost to former school districts of providing hearings to former students will not be eliminated by simply providing FAPE in the first instance. School districts will be required to provide hearings whenever one is requested. In many cases it may eventually be determined that the school district provided a perfectly appropriate program of education. This will not erase the cost to the school district of providing the hearing.

In fact, under the Court of Appeals decision, former students will have an incentive to join every past school district the student ever had to a single hearing. This will maximize the student's chances of eventually procuring some measure of relief. Further, it will pit the school districts against each other in an effort to show that it was another school district's failures that accounted for a student's denied FAPE.

C. This is a Matter of First Impression for the U.S. Supreme Court.

The U.S. Supreme Court has never ruled on the question of whether multiple school districts can be simultaneously required to provide a local due process hearing to a disabled student. Neither has the Court had an opportunity to consider the extent to compensatory education can be ordered from a former school district. These are extremely important issues that are currently wreaking havoc in the arena of special education due to disharmony implicit in the relevant legal authority.

The U.S. Supreme Court has considered the applicability of the IDEA in several previous cases. For example, the Court has construed the IDEA in cases involving tuition reimbursement and student discipline. See, Honig v. Doe, 108 S.Ct. 592 (1988); Burlington Sch. Comm. v. Mass. Dept. Of Educ., 105 S.Ct. 1996 (1985); Florence County Sch. Dist. Four v. Carter, 114 S.Ct. 361 (1993). The Court has never reviewed a case concerning whether a former school district has the responsibility to provide a due process hearing to a requesting student for whom the responsibility to provide FAPE has transferred to another school district. Further, the Court has never considered the propriety and scope of compensatory education. Compensatory education has become the "poor man's Burlington," and courts across the country are routinely awarding it in appropriate cases.

Unfortunately, it is altogether unclear when it is proper to award such compensatory education. The current case represents an opportunity for the Supreme Court to issue a definitive statement on the availability of compensatory education. Burlington and Carter have articulated the test to use in determining when tuition reimbursement necessary. Similar guidance on the analogous remedy of compensatory education is needed.

Supreme Court review is necessary to clarify this issue as it is one that will fundamentally change and expand the scope of local due process hearings and increase the costs of providing special education. Therefore, the Petitioner seeks an order granting review of the decision of the Minnesota Court of Appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: October 9, 1996

Respectfully submitted,

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69-2104-9817-3/69-1100-9833-3

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR SPECIAL SCHOOL DISTRICT NO. 1
AND THE DEPARTMENT OF CORRECTIONS

In the Matter of Hajji McReynolds,

and ORDER BIFURCATING MATTERS

Special School District No. 1 and
the Department of Corrections

This matter is before Administrative Law Judge Steve M. Mihalchick, appointed as Hearing Officer in these matters by the Commissioner of Education, upon the Department of Corrections' motion that the matters be bifurcated.

Laura Tubbs Booth, Rider, Bennett, Egan & Arundel, P.L.L.P., 2000 Metropolitan Centre, 333 South Seventh Street, Minneapolis, MN 55402, represents the Department of Corrections. Sonja D. Kerr, Attorney at Law, Suite 214, 790 Cleveland Avenue South, St. Paul, MN 55116 represents the Student and his parents in this matter. Claire C. Olson, Ratwik, Roszak, Bergstrom & Maloney, P.A., 300 Peavey Building, 730 Second Avenue South, Minneapolis, MN 55402 represents Special School District No. 1.

The Hearing Officer finds that the issues in these matters are almost entirely distinct, that bifurcating the matters will likely result in a quicker resolution of the matter involving the Student's current placement with the Department of Corrections, and that bifurcation is therefore in the best of the Student.

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. The above entitled matters are bifurcated for hearing and all other purposes.

2. The matter involving Special School District 1 will proceed in accordance with the Scheduling Order of June 23, 1995.

3. The hearing in the matter involving the Department of Corrections will commence July 17, 1995, at 9:30 a.m., at the Minnesota Correctional Facility--Red Wing, and continue on the following days as necessary and as agreed by the parties. The Department of Corrections will arrange for an appropriate hearing room.

July 5, 1995

s/s
STEVE M. MIHALCHICK
Administrative Law Judge

69-1100-9833-3

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of Hajji McReynolds,

and

the Department of Corrections

ORDER ON MOTION FOR INTERIM SERVICES

This matter is before Administrative Law Judge Steve M. Mihalchick, appointed as Hearing Officer in this matter by the Commissioner of Education, upon the Student's motion for interim special education services.

Sonja D. Kerr, Attorney at Law, Suite 214, 790 Cleveland Avenue South, St. Paul, MN 55116 appeared on behalf of the Student Hajji McReynolds and his parents in this matter. Laura Tubbs Booth, Rider, Bennett, Egan & Arundel, P.L.L.P., 2000 Metropolitan Centre, 333 South Seventh Street, Minneapolis, MN 55402, appeared on behalf of the Department of Corrections.

Based upon the record herein, and for the reasons stated in the following memorandum, IT IS HEREBY ORDERED that:

1. The Department of Corrections shall provide interim services to the Student in accordance with the Interim IEP written by the Department on June 14, 1995.

2. The Department of Corrections shall complete the assessments for ADD, ADHD, learning disability, for

emotional behavior disorder, and for speech and language, as previously agreed by the Department, no later than July 12, 1995.

3. The Department of Corrections shall promptly reconvene the IEP team upon completion of the assessments, but in any event, no later than July 13, 1995.

4. The Interim IEP written June 14, 1995, shall be in place for 60 days from June 14, 1995, unless sooner replaced by a final IEP agreed to by the IEP team or ordered by the Hearing Officer.

5. The Department of Corrections may provide psychological therapy to the Student in accordance with its normal policies and the Student's care and treatment program. The psychological treatment does not appear to be required as part of providing the Student with a free, appropriate public education.

6. The Department of Corrections may allow the Student to take homeopathic vitamins and receive chiropractic care in accordance with its normal policies and the Student's care and treatment program. Such treatment does not appear to be required as part of providing the Student with a free, appropriate public education.

July 5, 1995

s/s
STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

The Department has filed a Responsive Motion in this matter setting forth a large number of facts, many of which have not been supported by affidavits or documents. Relying upon the integrity of counsel, the statement of facts has been accepted as accurate.

It appears that the Department of Corrections has complied with the requirements of Minn. R. 3525.2325 in establishing an interim IEP for the Student. Subp 3 A. of that rule provides that if the pupil's current IEP can't be implemented in full by a long-term program at which a pupil is placed for care and treatment, (in this case, the Department of Corrections) the educational staff of the program must contact the parents to secure agreement to interim services while assessments are being done or call and IEP team meeting to revise the current IEP or develop an interim IEP while the pupil is undergoing assessments. The rule does not say what happens if the IEP team is unable to reach agreement. Presumably the normal due process procedures apply.

In this case the IEP team meeting was called. It was held June 13, 1995, and attended by the parents and their attorney. The Department wrote an interim IEP the next day, but the parents did not agree to the interim IEP and by letter of their attorney of June 29, 1995, formally rejected it. Thus, at the moment, the existing IEP is the last one done by Minneapolis Public Schools.

The interim IEP of June 14, 1995, appears to be complete as to the assessments that have already been done and sets forth fairly specific goals and objectives for meeting the Student's needs that have been identified to this point. The Department is moving ahead with the assessments requested by the parents and those will be incorporated into a final IEP. Therefore, it appears that the interim IEP written by the

Department of Corrections is quite suitable for the Student's services for the near future.

The principle reason that the Motion for Interim Services was made was that the hearing in the combined matters had been set for August 7, 1995, and there was a need for a more prompt resolution of the Student's current situation. Since the matters have been bifurcated and the hearing in this matter has been set to begin July 17, 1995, by a separate Order today, that need no longer exists to such an extreme.

69-2104-9817-3/69-1100-9833-3

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR SPECIAL SCHOOL DISTRICT NO. 1
AND THE DEPARTMENT OF CORRECTIONS

In the Matter of Hajji McReynolds,

and

Special School District No. 1 and
the Department of Corrections

ORDER

This matter came on for oral argument on July 12, 1995, before Administrative Law Judge Steve M. Mihalchick, appointed as Hearing Officer in these matters by the Commissioner of Education, upon the Student's Motion for Reconsideration of the Order Bifurcating Matters issued July 5, 1995.

Laura Tubbs Booth, Rider, Bennett, Egan & Arundel, P.L.L.P., 2000 Metropolitan Centre, 333 South Seventh Street, Minneapolis, MN 55402, appeared on behalf of the Department of Corrections. Sonja D. Kerr, Attorney at Law, Suite 214, 790 Cleveland Avenue South, St. Paul, MN 55116 appeared on behalf of the Student and his parents. Kevin J. Rupp, Ratwik, Roszak, Bergstrom & Maloney, P.A., 300 Peavey Building, 730 Second Avenue South, Minneapolis, MN 55402 appeared on behalf of Special School District No. 1.

The Student has moved for reconsideration of the July 5, 1995, Order Bifurcating Matters and has requested that the matters be consolidated for hearing. It appears to the hearing

officer that it is in the best interest of the Student that the matters remain separate, primarily so that the matter involving the Department of Corrections and the Student's current placement can be resolved most quickly. The hearing officer sees no benefit whatsoever to combining the matters. To do so would complicate the hearings and delay the process for the Student, the Department of Corrections and Special School District No. 1.

NOW, THEREFORE, IT IS HEREBY ORDERED that:

The Student's Motion for Reconsideration of the Order Bifurcating Matters of July 5, 1995, is DENIED.

July 14, 1995

s/s
STEVE M. MIHALCHICK
Administrative Law Judge

69-1100-9833-3

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of Hajji McReynolds,

and

SUPPLEMENTAL ORDER ON MOTION FOR INTERIM SERVICES

the Department of Corrections

This matter came on for oral argument on July 12, 1995, before Administrative Law Judge Steve M. Mihalchick, appointed as Hearing Officer in this matter by the Commissioner of Education, upon the Student's motion for reconsideration of the Order on Motion for Interim Services issued July 5, 1995.

Sonja D. Kerr, Attorney at Law, Suite 214, 790 Cleveland Avenue South, St. Paul, MN 55116 appeared on behalf of the Student Hajji McReynolds and his parents in this matter. Laura Tubbs Booth, Rider, Bennett, Egan & Arundel, P.L.L.P., 2000 Metropolitan Centre, 333 South Seventh Street, Minneapolis, MN 55402, appeared on behalf of the Department of Corrections. Kevin J. Rupp, Ratwik, Roszak, Bergstrom & Maloney, P.A., 300 Peavey Building, 730 Second Avenue South, Minneapolis, Minnesota 55402, appeared on behalf of Special School District No. 1.

Based upon the record herein, and for the reasons stated in the following memorandum, IT IS HEREBY ORDERED that:

The Order on Motion for Interim Services issued July 5, 1995, is affirmed in all respects except that paragraph 5 thereof is hereby modified to read:

> 5. The Department of Corrections shall provide psychological counseling to the Student directly by a licensed psychologist for 60 minutes per week effective immediately. Such direct psychological counseling by a licensed psychologist may be provided to the Student as part of the Student's care and treatment program at Redwing. If it is not already provided as part of the care and treatment program, it shall be provided in addition to whatever psychological therapy is provided by the care and treatment program.

July 14, 1995

s/s
STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

In the Order on Motion for Interim Services dated July 5, 1995, the hearing officer incorrectly concluded that psychological treatment was not required as part of providing the Student with a free appropriate public education. In fact, it appears that such therapy has been provided previously under prior IEPs and that such counseling may well be a necessary part of the Student's special education. Further, it is unknown whether the psychological therapy received by the Student under the Department's care and treatment program for the Student includes direct counseling by a licensed psychologist. The intent of the Order here is to ensure that the Student receives one hour of counseling by a licensed psychologist each week, either as part of the care and treatment program or as part of his special education services.

SMM

CONTAINS NOT PUBLIC DATA 69-2104-9817-3

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR SPECIAL SCHOOL DISTRICT NO. 1

In the Matter of Hajji McReynolds and Special School District No. 1.	ORDER RESCHEDULING HEARING AND STAYING DECISION ON MOTION TO DISMISS

The above-entitled matter is before Administrative Law Judge Steve M. Mihalchick, appointed as independent hearing officer in this matter by the Commissioner of Education, upon the School District's motions to dismiss and to stay the proceedings to allow an appeal if the motion is denied.

Sonja D. Kerr, Attorney at Law, 790 Cleveland Avenue South, Suite 214, St. Paul, Minnesota 55116, appeared on behalf of the Student Hajji McReynolds and his parents. Kevin J. Rupp, Ratwik, Roszak, Bergstrom & Maloney, P.A., 300 Peavey Building, 730 Second Avenue South, Minneapolis, Minnesota 55402, appeared on behalf of Special School District No. 1, Minneapolis, Minnesota (the School District).

Based upon the record herein, and for the reasons stated in the following Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

1. The School District's request for a stay is considered a request for an extension of the due date for the decision in this matter.

2. The hearing will be held commencing August 21, 1995, at 9:30 a.m. at a location to be determined and will continue through August 25, 1995, if necessary. The School District shall obtain a hearing location in Minneapolis and inform the Independent Hearing Officer and the Pupil as soon as possible.

3. The date the final decision in this matter is due is further extended from August 25, 1995, to September 8, 1995.

4. The parties shall keep the Hearing Officer informed of the status of the Hearing Review Officer's decision in 52-2103-9816-3 and provide copies of her final decision in that matter.

Dated this/ 19th of July 1995

s/s
STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

The School District has moved to dismiss this matter because the Student is now in the custody of the Department of Corrections and the School District has no current responsibility for his special education. The Student has been in the Minnesota Correctional Facility-Red Wing since May 13, 1995, and will be released on parole between September 11 and November 6, 1995. He will turn 18 years old on October 28, 1995, and it is not known at this time whether he will return to school in the School District when released. The Student has requested a due process hearing on issues

involving his special education in the School District back to February 14, 1991, and on the development of a current IEP that would be implemented upon his return to school in the School District.

Oral argument on the motion to dismiss was heard July 10, 1995, and a decision is pending. At a motion hearing in the related matter involving the Department of Corrections on July 12, 1995, the Hearing Officer announced to the parties that he was likely to deny the School District's motion to dismiss. By letter of July 13, 1995, the School District notified the Hearing Officer that it had been successful in obtaining the assignment of a Hearing Review Officer by the Department of Education to hear an appeal from the denial of a similar motion to dismiss in another due process hearing, W.S. and Special School District No. 1, (OAH Docket No. 52-2103-9816-3). By letter of July 16, 1995, the Student replied that he took the position that until a final decision was rendered, there could be no appointment of a Hearing Review Officer to consider an interim appeal under Minn. R. 3525.4600. The Student also enclosed correspondence between his counsel and the Department of Education earlier this year in which the Department declared that no appeal from a denial of a motion to dismiss could be made. Also involved in that case was the fact that there was an action pending in Federal Court seeking injunctive relief and the Administrative Law Judge stayed the matter pending the Federal Court decision.

The lack of procedural rules to guide the Administrative Law Judge, the Department of Education, and the parties makes ruling on procedural issues in these matters more difficult and time consuming. Under the rules of the District Courts, the denial of a motion to dismiss or a motion for summary disposition by the trial court cannot normally be appealed. However, a trial court can certify an important and doubtful question to the Court of Appeals. Likewise, in

contested cases under the rules of the Office of Administrative Hearings, no motions may be made to or decided by the agency making the final decision unless the motion is certified to the agency by the Administrative Law Judge for one or more of the reasons specified in Minn. R. 1400.7600.

It appears that the Department of Education has reached inconsistent conclusions on whether an appeal can be taken from a denial of a motion to dismiss. However, Judge Frankman in the W.S. case specifically stayed the matter to allow the School District to appeal, which is essentially certifying the motion to the Department of Education. The Department of Education assigned a Hearing Review Officer and that decision is now due on August 5, 1995.

This Administrative Law Judge declines to stay this matter to allow an appeal or to certify the matter to a Hearing Review Officer because there is no procedure for doing so and because there is a better alternative available. Because the Hearing Review Officer's decision in W.S. is due relatively soon, because the Student is currently receiving special education services from the Department of Corrections under an agreement between the parties, and because the Student will not return to school in the School District until at least September 11, 1995, if ever, it is appropriate to stay the issuance of the ruling on the Motion to Dismiss until the Hearing Officer has had the benefit of reviewing the Decision of the Hearing Review Officer in the W.S. matter. However, an indefinite stay is not appropriate. If the Motion to Dismiss is ultimately denied, the matter will need to be heard and decided quickly. Therefore, the hearing, if held, will be held commencing August 21, 1995.

S.M.M.

CONTAINS NOT PUBLIC DATA 69-1100-9833-3

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of Hajji McReynolds and the Department of Corrections

FINDINGS OF FACT, CONCLUSIONS, AND ORDER

This matter came on for hearing before Administrative Law Judge Steve M. Mihalchick, appointed as Hearing Officer in this matter by the Commissioner of Education, on July 17, 1995, at the Minnesota Correctional Facility-Red Wing, Red Wing, Minnesota.

Sonja D. Kerr, Attorney at Law, Suite 214, 790 Cleveland Avenue South, St. Paul, MN 55116 appeared on behalf of the Student Hajji McReynolds and his parents in this matter. Laura Tubbs Booth, Rider, Bennett, Egan & Arundel, P.L.L.P., 2000 Metropolitan Centre, 333 South Seventh Street, Minneapolis, MN 55402, appeared on behalf of the Department of Corrections.

This decision is final and binding upon both parties unless appealed to a hearing review officer within 30 calendar days following receipt of this decision, as provided under Minn. Stat. § 120.17, Subd. 3b(g). Any Notice of Appeal shall be in writing and shall be filed with the Commissioner of Education with copies sent to all parties.

If the decision is appealed, the written transcript of the hearing shall be made available to the parties involved within five calendar days of the filing of the appeal. The parties already have copies of the entire written transcript of the hearing, and the original of the transcript is in the possession of the Office of Administrative Hearings. In the event of an

appeal, the hearing review officer shall issue a final independent decision based on an impartial review of this decision and the entire record within 30 calendar days after the filing of the appeal. The hearing review officer shall seek additional evidence if necessary and may afford the parties an opportunity for written or oral argument.

The decision of the hearing review officer is final unless appealed to the Court of Appeals. Any such judicial review shall be conducted in accordance with the provisions of Minn. Stat. Ch. 14.

STATEMENT OF ISSUE

The only unresolved issue in this matter involves the location of an assessment of the Student and the amount of the Department of Correction's payment obligation for that assessment.

Based upon the record herein, the Administrative Law Judge makes the following

FINDINGS OF FACT

1. The Student is a 17 year old male who normally lives with his parents in Minneapolis, Minnesota, and attends school in the Minneapolis Public Schools, Special School District No. 1.

2. On March 13, 1995, the Student was adjudicated delinquent by the Juvenile Court of Hennepin County, Minnesota, and committed to the Commissioner of Corrections. However, that commitment was stayed upon condition that the Student enter and complete the program at Second Chance Ranch. The Student entered the program, but

did not successfully complete the program and was terminated from it on April 28, 1995. Ex. 1.

3. On May 11, 1995, the Student was committed by the Juvenile Court to the custody of the Commissioner of Corrections, "in accordance with their grid, or until the Commissioner discharges the child, whichever occurs first." The Commitment ordered that the Student be committed to the care of the Commissioner of Corrections until age 19, unless sooner discharged. Ex. 1.

4. On May 13, 1995, the Student arrived at the Minnesota Correctional Facility--Red Wing. On June 26, 1995, he met with Deborah A. Eng, Deputy Executive Officer for Juvenile Release, for his Initial Review to determine his release date, among other things. Based upon the offense for which he was committed, violation of conditions of probation, and his delinquency history score for three felony offenses, the "grid" used by the Department recommended a six month placement which could be reduced to four months by the Student completing his treatment plan. The Deputy Executive Officer followed the recommendation and established an "extended review date" of November 6, 1995, and a "minimum review date" of September 11, 1995. Ex. 2. In other words, it can be expected that the Student will be released from Red Wing on parole about September 11, 1995, if he completes his treatment program quickly or about November 6, 1995, if he does not.

5. Prior to May 13, 1995, the Student had been in a number of juvenile detention or treatment facilities, none of which are operated by the Commissioner of Corrections.

6. The Student, his parents and the Department of Corrections agree that the Student should receive the

following special education services while in the custody of the Department of Corrections:

a. Notwithstanding the present assessment that the Student is not eligible as having a Specific Learning Disability, the Department of Corrections will provide the Student three hours per week of LD services in mathematics by an LD-licensed teacher.

b. The Department of Corrections will provide the Student three hours per week of LD/EBD services in reading instruction by an LD/EBD-licensed teacher, namely, Joan Weiss.

c. The Department of Corrections will provide the Student 20 to 60 minutes per week of speech and language instruction with an emphasis on word finding and comprehension.

d. The Department of Corrections will provide the Student 60 minutes per week of one-on-one psychological counseling by a licensed psychologist.

e. The Student's parents have executed a release authorizing John DeFrancisco, the licensed psychologist at Red Wing, to discuss the Student's homeopathic needs with Dr. Lokich.

f. Mr. DeFrancisco will discuss the Student's homeopathic diet with Dr. Lokich and work on methods to implement the diet if the Student chooses to eat it.

7. The parties agree that a complete psychological and academic assessment of the Student should be performed, as recommended by Mr. DeFrancisco in his report of June 29,

1995, for the purpose of ruling out a mental illness as opposed to Attention Deficit Hyperactivity Disorder, and including the Student's parents for an accurate biological and developmental history.

8. Mr. DeFrancisco recommended that the complete assessment be completed by Paul Fountain and the Cannon Valley Mental Health Center in Faribault, Minnesota. The Clinic has informed the Department of Corrections that the cost of such an assessment would be approximately $700 to $800. The Department of Corrections is willing to pay the cost of the assessment at the Cannon Valley Mental Health Center or $700 toward the cost of such an assessment from another provider if the Student's parents so desire. The Student's parents informed the hearing officer by letter of July 20, 1995, that they had decided not to use Paul Fountain and the Cannon Valley Mental Health Center. They requested that they be allowed to conduct additional evaluations wherever the parents selects as long as the cost does not exceed $1,500, and that if the amount is in excess of that they would agree to allow the amount to be billed to Medical Assistance, which apparently provides coverage to the Student. They also noted that they had contacted Park Nicollet Medical Center which has a Learning Disabilities Clinic and a Mental Health Unit, and which indicated that it would receive information on the Student and determine the necessary assessments to be completed. The Department of Corrections then objected to being required to paying anything beyond the $700 it can obtain the for assessment from the Cannon Valley Mental Health Center. The Parents then objected to being required to submit the bill for any assessment to Medical Assistance.

Based upon the foregoing findings of fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge, the Department of Corrections, and the Commissioner of Education have jurisdiction in this matter pursuant to Minn. Stat. § 120.17, Subd. 3b(d), Minn. Stat. § 14.55, and Minn. R. 3525.4000.

2. This decision has been rendered 46 calendar days from the date of receipt of the request for hearing on June 8, 1995; the 45th day was a Sunday.

3. Pursuant to Minn. Stat. § 120.17, subd. 7(b) and Minn. R. 3525.2325, subp. 3, the Department of Corrections is considered to be the school district responsible for regular and special education services of students committed to state correctional facilities. In this matter, the Department of Corrections is responsible for special education services for the Student from May 13, 1995, to the date the Student is released on parole or discharged from the Minnesota Correctional Facility-Red Wing.

4. The special education services agreed to by the parties and set forth in Finding 6 above are appropriate for the Student based upon the assessments completed and needs identified to date.

5. A complete assessment as recommended by Mr. DeFrancisco and as outlined in Finding 7 above is necessary to determine more specifically the Student's educational needs and the extent of any mental illness.

6. The Cannon Valley Mental Health Center in Faribault, Minnesota, is an appropriate provider for the assessment in terms of competence, cost, and timing. The obligation of the Department of Corrections for any

assessment at any other location should be limited to $1,000, the approximate maximum cost at Cannon Valley.

7. Medical Assistance should be applied for to cover the cost of the assessment.

Based upon the forgoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

1. The Department of Corrections shall provide special education services to the Student from May 13, 1995, until the Student is released on parole or discharged from the Minnesota Correctional Facility-Red Wing.

2. The Department of Corrections shall provide the following special education services to the Student until further assessments are completed and the IEP team, including the Student's parents, develops a revised IEP for the Student:

a. Notwithstanding the present assessment that the Student is not eligible as having a Specific Learning Disability, the Department of Corrections will provide the Student three hours per week of LD services in mathematics by an LD-licensed teacher.

b. The Department of Corrections will provide the Student three hours per week of LD/EBD services in reading instruction by an LD/EBD-licensed teacher, namely, Joan Weiss.

c. The Department of Corrections will provide the Student 20 to 60 minutes per week of speech and language instruction with an emphasis on word finding and comprehension.

d. The Department of Corrections will provide the Student 60 minutes per week of one-on-one psychological counseling by a licensed psychologist.

e. Mr. DeFrancisco will discuss the Student's homeopathic diet with Dr. Lokich and work on methods to implement the diet if the Student chooses to eat it.

3. A complete psychological and academic assessment of the Student shall be performed, as recommended by Mr. DeFrancisco in his report of June 29, 1995, at a location of the parents' choice. If the assessment is completed at the Cannon Valley Mental Health Center, the Department of Corrections shall pay any cost thereof that is not paid for by Medical Assistance. If the assessment is completed at any other facility, and if the assessment is completed and the report thereof submitted to the Department of Corrections by August 31, 1995, the Department of Corrections shall pay up to $1,000 of the cost thereof not paid by Medical Assistance. If the assessment report is not completed and submitted to the Department of Corrections by that date, the Department shall have no liability therefore.

4. The Parents shall cooperate with whatever clinic they choose for the assessment in order to obtain Medical Assistance payment for any or all of the psychological and educational assessment to be performed and, if it is required, seek prior authorization in order to secure such payment. The obligation of the Department of Corrections to make payment for the assessment to the Cannon Valley Mental Health Center

or any other provider is contingent upon the Parents seeking reimbursement by Medical Assistance and complying with any prior authorization or other requirements of Medical Assistance to secure the payment.

5. This Order does not determine or affect the responsibility, if any, of Special School District No. 1 or any other entity for reimbursement of any of the cost of the assessment.

Dated this 24th day of July, 1995

s/s
STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Kirby Kennedy & Associates Transcript prepared.

MEMORANDUM

Under 34 C.F.R. § 300.503(b), a parent has a right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the school. However, the school may initiate a due process hearing to show that its evaluation is appropriate. If the evaluation is found to have been appropriate, the school does not have to pay for the independent educational evaluation. In this case, the Parents have said they have some concerns about the assessment at the Cannon Valley Mental Health Center that has been offered by the Department of Corrections. The concern was not specified in the Parents' letter of July 20, 1995, and the Parents' attorney stated that she did not return the call to Mr. DeFrancisco as the hearing officer requested

she do at the hearing of July 17, 1995. There is no basis at this point for the hearing officer to conclude that an assessment by the Cannon Valley Mental Health Center would not be appropriate. The Parents have contacted the Park Nicollet Medical Center which, by its very reputation, would be appropriate to conduct the assessment. However, there is no estimate of the cost other than the Parents' offer to "allow Medical Assistance to be billed for any amount over $1,500."

It might be appropriate in this case to request the parties to submit additional evidence and argument regarding the appropriateness of assessments at the two facilities and the relative costs. However, that will cause an unreasonable delay in time, so the hearing officer has decided to resolve the matter at this point. In doing so, it should be noted that it is not up to the parents to allow or not to allow Medical Assistance to be billed for the assessments. If the assessment is covered by Medical Assistance, then Medical Assistance should pay for the assessment and both the Parents and the Department of Corrections should have the benefit thereof..

A review of the rules governing the Medical Assistance program indicates that Medical Assistance should pay for the assessment, at least in part, if proper application is made. Minn. R. 9505.0323 governs the payment for mental health services under Medical Assistance. Under subpart 3 of that rule, Medical Assistance payment is available for a diagnostic assessment if the provider complies with the requirements of the rule. Generally, Medical Assistance will pay for a diagnostic assessment limited to two hours, but under subparts 5, 6 and 7 of the rule, additional time to complete a diagnostic assessment will be paid for by Medical Assistance under certain conditions if prior authorization is received. Therefore, the Parents are directed to apply for Medical Assistance coverage for the assessment and comply with any prior authorization or similar requirements that may be imposed.

Finally, the hearing officer is aware that assessments by Metro area clinics often take months to schedule and complete. Since the Student may be released in as little as a month and a half, an assessment delayed over a month would not be very useful at Redwing and the Department should have no liability for it.

S.M.M.

CONTAINS NOT PUBLIC DATA 69-2104-9817-3

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR SPECIAL SCHOOL DISTRICT NO. 1

In the Matter of Hajji McReynolds and Special School District No. 1 ORDER GRANTING MOTION TO DISMISS

This matter is before Administrative Law Judge Steve M. Mihalchick, appointed as Hearing Officer in this matter by the Commissioner of Education, on the District's Motion to Dismiss. Oral argument was heard on the motion on July 10, 1995. The record was closed on August 11, 1995, upon receipt of supplemental memoranda from the parties.

Sonja D. Kerr, Attorney at Law, Suite 214, 790 Cleveland Avenue South, St. Paul, MN 55116 appeared on behalf of the Student Hajji McReynolds and his parents in this matter. Kevin J. Rupp, Ratwik, Roszak, Bergstrom & Maloney, P.A., 300 Peavey Building, 730 Second Avenue South, Minneapolis, MN 55402, appeared on behalf of Special School District No. 1 (the School District).

This decision is final and binding upon both parties unless appealed to a hearing review officer within 30 calendar days following receipt of this decision, as provided under Minn. Stat. § 120. 17. Subd. 3b(g). Any Notice of Appeal shall be in writing and shall be filed with the Commissioner of Education with copies sent to all parties.

In the event of an appeal, the hearing review officer shall issue a final independent decision based on an impartial review of this decision and the entire record within 30 calendar days after the filing of the appeal. The hearing review officer shall

seek additional evidence if necessary and may afford the parties an opportunity for written or oral argument.

The decision of the hearing review officer is final unless appealed to the Court of Appeals. Any such Judicial review shall be conducted in accordance with the provisions of Minn. Stat. Ch. 14.

STATEMENT OF ISSUE

Whether the hearing officer has jurisdiction over the School District in a special education due process hearing while the Student is confined to a state correctional facility and the Department of Corrections has the present responsibility for the Student's special education.

Based upon the record herein, the Administrative Law Judge makes the following

FINDINGS OF FACT

1. The Student is a 17 year old male who until recently lived with his parents in Minneapolis, Minnesota, and attended school in the School District.

2. The Student moved to the School District in January 1991 as a 7th grader. Prior to that time he had lived in Chicago where he was in special education. He was in special education in the School District from then until recently. Early in 1995, he was in a number of juvenile detention or treatment facilities.

3. On March 13, 1995, the Student was adjudicated delinquent by the Juvenile Court of Hennepin County, Minnesota, and committed to the Commissioner of Corrections. However, that commitment was strayed upon

condition that the Student enter and complete the program at Second Chance Ranch. The Student entered the program, but did not successfully complete the program and was terminated from it on April 28, 1995.

4. Prior to May 1995, the Parents and the School District had had some disagreements regarding the Student's IEP. Apparently in early May 1995, the Parents retained counsel. On May 3, 1995, counsel wrote a letter addressed to five agencies in an effort to determine some questions regarding the Student's current special education services while he was, at that time, incarcerated at a county juvenile center. The letter was addressed to the Minnesota Department of Corrections, the Minnesota Department of Education, the School District, the County Probation Officer, and another school district in which a detention center at which the Student had previously been placed was located. In that correspondence and in subsequent correspondence on May 12, 1995, the Student's counsel requested that conciliation conferences be held to resolve the disagreements over the Student's special education program. Exs. B, C and D attached to the Student's Reply Memo of August 11, 1995.

5. On May 11, 1995, the Student was committed by the Juvenile Court to the custody of the Commissioner of Corrections, "in accordance with their grid, or until the Commissioner discharges the child, whichever occurs first." The Commitment ordered that the Student be committed to the care of the Commissioner of Corrections until age 19, unless sooner discharged.

6. On May 13, 1995, the Student arrived at the Minnesota Correctional Facility--Red Wing. It can be expected that the Student will be released from Red Wing on parole about September 11, 1995, if he completes his

treatment program quickly or about November 6, 1995, he does not. The Student has 'indicated to Department of Corrections' officials that upon release he may move to Wisconsin.

7. A due process hearing was requested by letter of June 7, 1995, from the attorney for the Student addressed to the attorney for the School District and the Commissioner of Corrections. It stated that the Student had not received an appropriate program of education throughout the years at the School District and while subject to incarceration at Red Wing. Enclosed with the letter were a Statement of Objections, a witness list, a list of all documents likely to be introduced at hearing and copies of those documents. By letter of June 16, 1995, the Department of Education appointed the Hearing Officer to conduct the due process hearing in the matter involving the School District. By letter of June 28, 1995, the Department of Education appointed the Hearing Officer to conduct the due process hearing in the matter involving the Department of Corrections. The Hearing Officer subsequently ordered that the matters be bifurcated.

8. The Student's Statement of Objections makes the general objection that the District has not provided a free appropriate public education by failing to accurately and completely assess the Student, by failing to provide transition services when appropriate, by failing to provide counseling services, by failing to provide services for the Student's learning disabilities, and by violating procedural safeguards and not providing a legal and sound IEP. The Statement of Objections makes specific objections to the sufficiency of the Student's IEPs, whether proposed or implemented, dating back to February 14, 1991. The Statement of Objections seeks "a legally constituted IEP", certain reassessments, four

years of compensatory education, and reimbursement of educational and related expenses.

9. The Student's special education program while at Red Wing has been agreed to among the Student, Parents, and Department of Corrections and was incorporated in an Order of the Hearing Officer in that matter dated July 24, 1995.

Based upon the foregoing findings of fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge was properly appointed by the Commissioner of Education pursuant to Minn. Stat. § 120.17, Subd. 3b(d), Minn. Stat. § 14.55, and Minn. R. 3525.4000.

2. Pursuant to Minn. Stat. § 120.17, subd. 7(b) and Minn. R. 3525.2325, subp. 3, the Department of Corrections is considered to be the school district responsible for special education services of students committed to state correctional facilities. In this matter, the Department of Corrections is responsible for special education services for the Student from May 13, 1995, to the date the Student is released on parole or discharged from the Minnesota Correctional Facility-Red Wing.

3. Because the Department of Corrections, not the School District, is presently responsible for the Student's education, the hearing officer lacks jurisdiction over the School District in the requested due process hearing. Therefore, the School District's Motion to Dismiss must be granted.

4. These Conclusions are made for the reasons set forth in the following Memorandum, which is incorporated as a part of this decision.

5. This decision has been rendered 68 calendar days from the date of receipt of the request for hearing on June 8, 1995. At the request of the parties, extensions were granted to the 45-day due date for the final decision. The latest extension had extended the due date to September 15, 1995.

Based upon the forgoing Conclusions, the hearing officer makes the following:

ORDER

IT IS HEREBY ORDERED that:

1. The School District's Motion to Dismiss the due process hearing in Ns matter is GRANTED.

2. The due process hearing scheduled to begin August 29, 1995, is canceled.

Dated this 15th day of August, 1995

s/s
STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

The School District moves for dismissal on the grounds that it has no current legal obligation to provide the Student with a free appropriate public education. The Student argues

that due process jurisdiction attached when the conciliation process was begun prior to the Student's placement at the Department of Corrections and, in addition, jurisdiction exists separately to address compensatory education issues for alleged past failures by the School District.

There are no disputed fact issues regarding the Motion to Dismiss and the legal issues are controlled by the Hearing Review Officer's decision in *In the Matter of W.S. and Special School District No. 1* (August 4, 1995). In *W.S.*, the pupil and his parent voluntarily moved from one district to another in 1994 and pupil attended public school in the new district. In 1995, the parent requested a due process hearing involving both districts and raising several years of concerns regarding the student's educational program in the prior district. A hearing officer was appointed and the prior district moved for dismissal on jurisdictional grounds. The hearing officer in the case denied the motion to dismiss, but bifurcated the matters and staved the hearing in the matter involving the prior district to allow for an appeal. The prior district requested that the Department of Education appoint a hearing review officer, which the Department of Education did. The pupil argued that the interlocutory appeal was illegal. In the decision of August 4, 1995, the Hearing Review Officer concluded that the prior district had a right to an interlocutory appeal and that because the pupil was not a resident of the prior district, the independent hearing officer lacked jurisdiction over the prior district. The Hearing Review Officer, therefore, granted the prior district's motion for dismissal.

The Student argues that *W.S.* is distinguishable because, in that case, the pupil and the parent moved, thereby changing the residence of the pupil from the prior district to the new district. In this case, the Student's legal residence has not changed. The Student's parents still live within the area of the School District and the Student has been involuntarily placed in a state correctional facility. Obviously, the Student's legal

residence has not changed to Red Wing because he is temporarily in a correctional facility there. Residency was the critical underlying issue in *W.S.*, because residency determined which district was responsible for providing the education. In the normal situation, the responsibility for providing for the education of a child goes to the district in which the child is legally resident. Minn. Stat. § 120.17, subd. 1; *W.S.* at 4. That is true even when the child is temporarily placed in a school or treatment program located in another district. Minn. Stat. § 120.17, subd. 6. However, an except ion is created for a student placed in a state institution. In such cases, the legal residence of the child remains the school district in which the parent resides, but if the educational needs of the child can be met through the institution, the cost for the instruction are paid by the department to which the institution is assigned. Minn. Stat. § 120.17, subd. 7. This is somewhat clarified in the rules of the Department of Education which specifically make the Department of Corrections "the district" for education programs run by it at correctional facilities. Minn. R. 3525.2325. Thus, the present case is indistinguishable from *W.S.* The School District is not presently responsible for the Student's education. A different school district, in this case the Department of Corrections, is responsible. Therefore, there is no jurisdiction in this case over the School District.

The Student argues that he should not be penalized because he participated in conciliation conferences rather than requesting a due process hearing earlier, prior to being incarcerated. Even if the request for hearing had been made earlier, the case still should have been dismissed. *Wakefield Public Schools,* 20 IDELR 592 (Oct. 15, *1993); Monahan v. State of Nebraska,* 687 F.2d 1164 (8th Cir. 1982).

The Hearing review Officer in *W.S.* specifically noted that the threshold issue is more important in analyzing the cases than the potential remedy of compensatory education. *W.S.* at

8. Thus, simply alleging a claim for compensatory education was not sufficient to confer jurisdiction over the prior school district in *W.S.* and it does not confer jurisdiction here. This is not to say that the Student is without a remedy as to the alleged past failures of the School District. The Department of Education's complaint process, with which the Parents are familiar according to documents in the file, can adequately address the issues raised regarding alleged deficiencies in the IEPs and in assessments. The Student may be able to institute an action in court. But, again, the issue of jurisdiction to consider compensatory education from a prior school district is controlled by the Hearing Review Officer decision in *W. S.*

Finally, it should be noted that the Hearing Officer feels compelled to follow the Hearing Review Officer's decision in *W.S.* for the sake of consistency in special education due process hearings in Minnesota and because the hearing review officers appointed by the Commissioner can be viewed as operating at a higher level than the hearing officers appointed by the Commissioner to conduct the initial due process hearings. Moreover, the decision appears to be well-reasoned and consistent with the principal purpose of due process hearings: Namely, to provide students and parents an impartial and speedy forum to deal with current disagreements.

S.M.M.

NOT PUBLIC OAH No. 69-2104-9817-3

STATE OF MINNESOTA
DEPARTMENT OF EDUCATION

FOR SPECIAL SCHOOL DISTRICT NUMBER NO. 1

In The Matter Of:
Hajji McReynolds, Student,

and
Special School District No. 1
Minneapolis, Minnesota

HEARING REVIEW OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND MEMORANDUM OF DECISION

PROCEDURAL HISTORY

The above entitled matter was heard by Independent Hearing Officer Steve M. Mihalchick, appointed as Independent Hearing Officer in this matter by the Commissioner of Education, pursuant to Minn. Stat § 120.17, Subd. 3b(d), Minn. Stat. § 14.55, Minn. R. 3525.4000, on the District's motion to dismiss. Oral argument was heard on the motion on July 10, 1995 and the record was closed on August 11, 1995.

Sonja D. Kerr, Attorney at Law, 790 Cleveland Avenue South, Suite 214, St. Paul, Minnesota 55116, appeared on behalf of the student, Hajji McReynolds and his parents, Nafeesah McReynolds and Barry McReynolds (hereinafter "Student"). Kevin J. Rupp, Ratwik, Roszak, Bergstrom, &

Maloney, P.A., 300 Peavey Bldg., 730 Second Avenue South, Minneapolis, Minnesota 55402, appeared on behalf of Special School District No. 1 (hereinafter "District").

An Order granting the District's Motion to Dismiss in the above entitled matter was issued by the Hearing Officer on August 15, 1995. Because the District's Motion to Dismiss was granted, the Due Process Hearing scheduled to begin August 29, 1995, was cancelled.

An appeal of the Order granting the District's Motion to Dismiss was filed with the Commissioner of Education on August 22, 1995. A Hearing Review Officer was appointed by the Minnesota Commissioner of Education pursuant to Minn. Stat. § 120.17 3b(f), (g) (h), Minn. R. 3525.4600, on August 25, 1995.

The Hearing Review officer provided a briefing schedule to the parties via FAX and mail on August 29, 1995. On September 5, 1995, the District requested an extension of four days for the Hearing Review Officer's final decision in this matter pursuant to Minn. R. 3525.4600. The Hearing Review Officer granted the extension based on the fact that the record was due August 27, 1995, but was not received until August 31, 1995. Therefore, the due date of the final decision in this matter was extended to September 25, 1995.

On September 5, Student's attorney requested additional time to prepare Student's brief, and requested that a telephone conference call be scheduled for September 6, 1995. A telephone conference call was held at 9:00 a.m. on September 6, 1995. Student's attorney requested an extension of time of 15 days for the submission of Student's appeal brief. She indicated that she needed to review documentation received from the Department of Education as well as documentation that she had requested but had not yet received from the Department of Education.

The Hearing Review Officer denied the request for an extension of time to file the brief because it was unclear whether the documentation referred to by Student's counsel was relevant, and because there had been no motion to admit additional evidence. The Hearing Review Officer Ordered that the Student's and District's appeal briefs be submitted pursuant to the briefing schedule which provided that the Student's brief was due September 6, 1995 and the District's brief was due September 11, 1995. The Hearing Review Officer also Ordered that if Student's attorney determined that the documentation that she was reviewing was relevant to the present appeal, she had the option of bringing a motion to submit additional evidence pursuant to Minn. R. 3525.4600 and that an amended briefing schedule would be established at that time.

The Hearing Review Officer received Students, appeal brief on September 6, 1995 and received the District's reply brief on September 11, 1995.

By this appeal, Student seeks a reversal of the independent hearing officer's decision granting the District's Motion to Dismiss the District from this proceeding.

Based on an impartial review of the local decision, the entire record, and appellate briefs, the Hearing Review Officer makes the following:

FINDINGS OF FACT

1. Student is a child with disabilities as defined by Minn. Stat. § 120.03 and 120.17, and thus is entitled to special education services pursuant to Minn. Stat. § 120.17.

2. Student moved to the school district in January 1991 as a seventh grader and was in special education in the District from 1991 until recently. Early in 1995 he was in number of juvenile detention or treatment facilities.

3. On March 13, 1995, Student was adjudicated delinquent by the Juvenile Court of Hennepin County, Minnesota, and committed to the Commissioner of Corrections. Student's commitment was stayed upon condition that the Student enter and complete the program at Second Chance Ranch. The Student entered the program but did not successfully complete the program and was terminated from it on April 28, 1995.

4. On May 3, 1995, Student's counsel wrote a letter addressed to five agencies in an effort to determine some questions regarding the Student's current special education services. The letter was addressed to the Minnesota Department of Corrections, the Minnesota Department of Education, the District, the County Probation Officer, and another school district in which a detention center at which Student had previously been placed was located. In that correspondence and in correspondence dated May 12, 1995, the Student's counsel requested that conciliation conferences be held to resolve the disagreements over the Student's special education program. Student's reply to Special School District No. 1's Supplemental Memo of August 11, 1995, Exh. B & C.

5. On May 11, 1995, the Student was committed by the Juvenile Court to the custody of the Commissioner of Corrections, "in accordance with their grid, or until the Commissioner discharges the child, whichever occurs first." The commitment Ordered that the Student be committed to the care of the Commissioner of Corrections until age 19, unless sooner discharged. Transcript of in the Matter of Hajji McReynolds and the Department of Corrections File No. 69-110-9833-3 (hereinafter DOC Hearing) DOC Hearing T.9; Exh. 1.

6. On May 13, 1995, the Student arrived at the Minnesota Correctional Facility Redwing. It is expected that Student will be released from Redwing on or about September 11, 1995, if he completes his treatment program quickly or on or about November 6, 1995, if he does not. Student indicated to Department of Correction officials that upon release he may move to Wisconsin. DOC Hearing Exh. 2.

7. Student, through his attorney, requested a Due Process Hearing by letter dated June 7, 1995. The request for a Due Process Hearing was directed to the District and the Department of Corrections. The letter stated that the Student had not received an appropriate program of education throughout the years at the District and while subject to incarceration by the Minnesota Department of Corrections.

8. By letter dated June 16, 1995, the Commissioner of Education appointed the Hearing Officer to conduct the Due Process Hearing in the matter involving the District. By letter dated June 28, 1995, the Commissioner of Education appointed the Hearing officer to conduct the Due Process Hearing in the matter involving the Department of Corrections. (June 28, 1995 letter not included in this record)

9. By order dated July 5, 1995, the Hearing Officer bifurcated the proceedings for hearing and all other purposes. The Due Process Hearing in the matter involving the Department of Corrections was scheduled to begin July 17, 1995 at 9:30 a.m. at the Minnesota Correctional Facility Redwing. The matter involving the District was scheduled to proceed in accordance with a scheduling Order of June 23, 1995.

10. On July 10, 1995, Student brought a Motion for Reconsideration of Bifurcation and Order for Interim Services.

By Order dated July 14, 1995, the Hearing Officer denied Student's Motion for Reconsideration of the order bifurcating matters.

11. A Due Process Hearing was held July 17, 1995, in the matter of Student and the Department of Corrections. In the course of the hearing the Student's special education program while at Redwing was agreed to among Student, Parents, and Department of Corrections and was incorporated in an Order of the Hearing officer in that matter dated July 24, 1995. DOC Hearing T. 41-67. (July 24, 1995 Order of the Hearing Officer not included in this record.)

12. On July 5, 1995, the District brought a Motion to Dismiss the District from the proceeding. Argument on the Motion to Dismiss was held July 10, 1995. Briefs on the Motion to Dismiss were submitted by both parties.

13. The Student's Statement of objections makes the general objection that the District has not provided a free appropriate public education to Student by failing to accurately and completely assess Student, by failing to provide transition services when appropriate, by failing to provide counseling services, by failing to provide services for the Student's learning disabilities, and by violating procedural safeguards and not providing a legal and sound IEP. The statement of objections makes specific objections to this efficiency of the Students IEP's, whether proposed or implemented, dating back to February 14, 1991. The statement of objections seeks "a legally constituted IEP", certain assessments, four years of compensatory education, and reimbursement of educational and related expenses. Attachment to June 7, 1995 letter requesting Due Process Hearing.

14. By Order dated August 15, 1995, the Hearing Officer Ordered that the District's Motion to Dismiss the Due Process Hearing in this matter be granted. The Hearing officer also Ordered that the Due Process Hearing scheduled to begin August 29, 1995 be canceled.

Based upon the foregoing Findings of Fact the Hearing Review officer makes the following:

CONCLUSIONS OF LAW

1. The Commissioner of Education and Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat § 120.17 and Minn. R. 3525.3800.

2. This matter is properly before the Hearing Review officer pursuant to Minn. Stat. § 120.17 Subd. 3b(g); Minn. R. 3525.4600.

3. The Individuals With Disabilities Education Act (IDEA, 20 U.S.C. § 1401, et. seq.) requires that each state in order to qualify for assistance under the act, establish a policy and plan that "assures all handicapped children the right to a free appropriate education". Minnesota has enacted such a plan in Minn. Stat. Chapter 120.17 and the Minnesota State Board of Education Special Education Rules, Minn. R. Chapter 3525.

4. 34 CFR § 300.506(a) states regarding impartial Due Process Hearings: "A parent or public educational agency may initiate a hearing on any of the matters described in Sec. 300.504(a)(1)(2)."
34 CFR 300.504(a)(1)(2)states:

(1) proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of a child or the provision of a free appropriate public education to the child.

Both state and federal regulations implementing IDEA obligate a school district to provide a Due Process Hearing to discuss a Student's current or proposed program of education. A Due Process Hearing is not available to Students who are not currently residing within the district and to whom the district has no current obligation.

5. Minn. Stat. § 120.17, Subd. 1, provides:

Every district shall provide special instructions and services either within the district or in another district, for handicapped children who are residents of the district and who are handicapped, as set forth in 120.03.

Minn. Stat. § 120.17, Subd. 6 (a) , provides:

The school district of residence of a child shall be the district in which the child's parent resides, if living, or the child's guardian, or the district designated by the Commissioner of Education if neither parent nor guardian is living within the state.

Minn. Stat. § 120.17, Subd. 7, dealing with responsibility for special instruction and services for a

child with a disability placed in a state institution on a temporary basis provides in relevant part:

(b) when the educational needs of such child can be met through the institutional program, the costs for such instruction shall be paid by the department to which the institution is assigned.

Minn. R. 3525. 2325 Subp. 1 D provides:

For those education programs run by the Department of Corrections, the District shall be the Department of Corrections for the purpose of this part . . . . Provision of special education services requires implementation of all due process safeguards defined in state and federal law. . . . For purposes of this part, pupils and regular education Students placed in the following facilities by someone other than the district are considered to be placed for care and treatment: (6) correctional facilities.

6. In the present case, the Department of Corrections is responsible for special education services for Student from May 13, 1995 to the date Student is released on parole or discharged from the Minnesota Correctional Facility Redwing. The Department of Corrections is therefore Student's district of residence, subject to the requirements of IDEA and the jurisdiction of an IDEA hearing officer.

Student is entitled to and, in fact, participated in a Due Process Hearing with the Department of Corrections.

7. The District is neither the Student's district of residence nor his provider school district and therefore is not subject to the requirements of IDEA or the jurisdiction of an

IDEA Due Process Hearing concerning the program of education being provided Student at this time.

8. The pre-hearing and appeal procedures in this case provided adequate due process to Student.

9. The Hearing Officer properly dismissed the school district from this proceeding.

Based upon the foregoing conclusions, the Hearing Review Officer makes the following:

Order

The Hearing Officer's Order granting the District's Motion to Dismiss the Due Process Hearing in this matter is affirmed.

Dated Sept. 20, 1995 s/s
Elizabeth Thompson
Hearing Review Officer

MEMORANDUM OF DECISION

Student's appeal in this matter sought a reversal of the Hearing Officer's decision to grant the District's Motion to Dismiss the Due Process Hearing. Student argued that an involuntary move does not eliminate his right to a Due Process Hearing and to do so violates the equal protection clause and due process clause of the 14th Amendment. Student argued that the Hearing Officer improperly interpreted Minn. Stat. § 120.17, Subd. 7 and that under a proper interpretation of said statute IDEA, state law and constitutional principals, Student is entitled, "like non incarcerated disabled children to request a

Due Process Hearing seeking compensatory education and that to deny him this right, denies him equal protection of the law." This argument is without merit. Student was provided due process and afforded the protection to which he is entitled under IDEA and state law. Student, in fact, was provided a Due Process Hearing in his current resident district, the Minnesota Department of Corrections Redwing.

The Hearing officer properly determined that Minn. Stat. § 120.17, Subd. 7 and Minn. R. 3525.2325 make the Department of Corrections, "the District" for education programs run by it at correctional facilities. Minnesota Department of Corrections Redwing is therefore the entity responsible for complying with IDEA and for providing Student, who is incarcerated within it's correctional facility, with FAPE.

Student also argued that the Hearing officer erred in relying on a recent Hearing Review Officer's decision and ignored United States Supreme Court precedent. The Hearing officer relied on relevant case law and properly determined that because Student is not a resident of the district, the Hearing Officer lacks jurisdiction over the district in this matter.

Both state and federal regulations implementing IDEA refer only to the obligation of a school district toward disabled Students residing within the school district at the time a hearing regarding a Student's program of education is requested. The Hearing officer properly relied on several cases which hold that a student must be a resident of a school district to invoke the protections provided by IDEA. In Wakefield Public Schools, 20 IDELR 592 (October 15, 1993) the Hearing Officer stated that, "the responsibility for the provision of appropriate special education services -rests solely with the school district where [Student] currently resides."

Likewise Federal District Judge Michael Davis dismissed for lack of jurisdiction a complaint brought by a Student because the Student was not a resident of the district from which he sought relief. Judge Davis stated, "because plaintiff is not a resident of IDS [#] as determined by Minn. Stat. § 120, this court has no basis upon which to grant the relief requested." Memorandum, opinion and Order of United States District Judge Davis, File No. 3-95-139 (March 23, 1995).

In Gerasimo v. Ambach, 636 F.Supp. 1504 (E.D.N.Y. 1986) a school district's obligation to students under IDEA was found to have ceased when the Students moved out of the district. A Federal District Court ruled that a parent's challenge to the educational placement of her twin sons was moot against a school district in which she no longer resided. The parent in Gerasimo had resided in the school district at 'the time she removed her children from their educational placement and unilaterally placed them in a private school. Four months later she moved her residence outside the boundaries of the school district. The court determined that the parent's request for a new educational placement for her children could not be properly brought against the school district in which she no longer resided. The court also ruled that the parent's request for tuition reimbursement was moot for any tuition which reflected education provided the Students by the private school after the parent had moved out of the district. Likewise, In Monahan v. State of Nebraska, 687 F. 2d 1164 (8th Cir. 1982), the Eighth Circuit Court of Appeals held that a non-resident Students' IDEA claim was moot against a school district on the grounds that the Student resided outside the boundaries of the school district at the time she made her claim.

A Minnesota Hearing Review officer in the recently decided case of In the matter of W.S. and Special School District No.1 (August 4, 1995) stated, "residency is a statutorily mandated threshold jurisdictional issue under IDEA

and Minnesota law. It is more important in analyzing cases than the underlying substantive dispute regarding a potential remedy," W.S. at 8. This Hearing Review Officer agrees with that analysis based upon careful consideration of the cases discussed above.

Student also argued on appeal that he had a right to enter into conciliation and should not be penalized because he participated in conciliation conferences rather than requesting a Due Process Hearing earlier, prior to being incarcerated. it is undisputed that student was committed to the Department of Corrections and incarcerated at the Redwing Facility at the time the request for a Due Process Hearing was made. As discussed, the Department of Corrections was Student's resident district at the time of his request for a hearing. Although not necessary to a determination of the propriety of dismissing the District in this case, the Hearing Officer properly concluded that even if a request for hearing had been made earlier, the case still should have been dismissed.

Finally, student argued that he should be entitled to a Due Process Hearing with the District because he has a claim for compensatory education. Student cited a line of cases including Hoekstra v. ISD 283, 22 IDELR 47 (SEA,MN 1994); Brantley v. St. Paul Public Schools, 22 IDELR 308 (MN, 1994); School Committee of the Town Of Burlington, Mass. v. Dept. of Ed., 105 F. 2d 1996 (1985); and Carter v. Florence County, 114 F. 2d 361 (U.S. 1993) These cases all stand for the proposition that compensatory education is an appropriate issue for a Due Process Hearing, and therefore past programs of education may he relevant in a Due Process Hearing. in the present case, however, the district is not obligated to provide a Due Process Hearing for the Student as the Student is not a resident of the district. The potential remedy of compensatory education is clearly not enough to confer jurisdiction over the district. In both the Burlington and Florence County cases cited by Student, the Student's

involved remained residents of the school district against which the IDEA action had been brought.

Although student is not entitled to a Due Process Hearing with the District at this time, Student is not without a remedy. Student may bring a court action or may file a complaint with the Minnesota Department of Education Complaint Resolution System.

E.T.

NOT PUBLIC OAH No. 69-2104-9817-3

STATE OF MINNESOTA
DEPARTMENT OF EDUCATION

FOR SPECIAL SCHOOL DISTRICT NUMBER NO. 1

In The Matter Of:
Hajji McReynolds, Student,

and

HEARING REVIEW OFFICER'S ORDER

Special School District No. 1
Minneapolis, Minnesota

The Hearing Review Officer issued a final decision in the above entitled matter on September 20, 1995 and served Findings of Fact, Conclusions of Law, Order and Memorandum of Decision on the parties by mail. Student's Counsel is Sonja D. Kerr, Attorney at Law, 790 Cleveland Avenue South, Suite 214, St. Paul, Minnesota 55116. District's Counsel is Kevin J. Rupp, Ratwik, Roszak, Bergstrom, & Maloney, P.A., 300 Peavey Bldg., 730 Second Avenue South, Minneapolis, Minnesota 55402. On September 19, 1995 Student brought four motions for consideration by the Hearing Review Officer. The Hearing Review Officer received these motions on September 21, 1995. Student's Motions are as follows:

1. Motion for Extension of Decision.

2. Motion to Add Minnesota Department of Education as a party.

3. Motion to Supplement the Record.

4. Motion to Remand for Hearing of the Merits.

Rule 3525.4600 provides:

> The Hearing Review Officer shall seek additional evidence if necessary and may afford the parties an opportunity for written or oral argument.

The Hearing Review Officer has determined that no additional evidence is necessary in this matter. The Hearing Review officer's decision of September 20, 1995 is therefore a final decision in this matter.

NOW, THEREFORE, IT IS HEREBY ORDERED that:

Student's Motion for Extension of Decision is DENIED;

Student's Motion to Add Minnesota Department of Education as a party is DENIED;

Student's Motion to Supplement the Record is DENIED;

Student's Motion to Remand for Hearing on the Merits is DENIED.

Dated September 26, 1995

s/s
Elizabeth Thompson
Hearing Review Officer

STATE OF MINNESOTA)

) AFFIDAVIT OF SERVICE
COUNTY OF RAMSEY) BY MAIL

Elizabeth S. Thompson, of the City of St. Paul, County of Ramsey, in the State of Minnesota being duly sworn, says that on the 26 day of September, 1995, she served the annexed ORDER;

Sonja D. Kerr
Attorney at Law
790 Cleveland Ave. So.
Suite 214
St. Paul, Minnesota 55116

Kevin J. Rupp
Attorney at Law
Ratwik, Roszak,
Bergstrom, & Maloney, P.A.
300 Peavey Bldg.
730 Second Avenue South
Minneapolis, Minnesota 55402

Ann Schluter
Acting Commissioner of Education
Minnesota Department of Education
Capitol Square Building
550 Cedar Street
St. Paul, Minnesota 55101

by mailing them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing same in the Shoreview, Minnesota Post office, directed to said persons at the above

stated address (es), the last known address (es) of said persons.

Subscribed and sworn to before me

this 26 day of September, 1995. s/ Elizabeth Thompson

s/Vickie Jauert
Notary Public

STATE OF MINNESOTA
IN COURT OF APPEALS

In The Matter of:
H. M., Student,

Relator,

ORDER

vs.

#C7-95-2204

Special School District
No. 1,

Respondent,

State Board of Education,

Respondent.

BASED UPON THE FILE, RECORD AND PROCEEDINGS, AND BECAUSE:

1. This is a certiorari appeal from an adverse decision of the Minnesota Department of Education.

2. N.M., the mother of relator H.M., moves for waiver of the appellate riling fee.

3. Filing fees are waived if the agency determines that relator is indigent. Minn. R. Civ. App. P. 103.01, subd. 3(a), (d), 101.02, subd. 4 ("trial court" includes agency whose decision is to be reviewed).

4. There is no indication relator has moved the agency to waive the riling fees on appeal.

IT IS HEREBY ORDERED:

1. On or before November 3, 1995, relator shall (a) pay the $250 filing fee for appeal or (b) obtain an order from the agency waiving the riling fee on the basis of indigency.

2. Failure to comply with this order will result in dismissal.

Dated: October 24, 1995

BY THE COURT

s/Edward Touissant
Chief Judge

CLL:mbs

NOT PUBLIC OAH No. 69-2104-9817-3

STATE OF MINNESOTA
DEPARTMENT OF EDUCATION

FOR SPECIAL SCHOOL DISTRICT NUMBER NO. 1

In The Matter Of:
Hajji McReynolds, Student,

and

HEARING REVIEW OFFICER'S ORDER

Special School District No. 1
Minneapolis, Minnesota

Upon the affidavit of Student, a minor, by and through his parents, Nafeesah McReynolds, and Barry McReynolds and pursuant to Rule 103 of the Minnesota Rules of Civil Appellate Procedure, the Hearing Review Officer finds that Student's claims are not frivolous and therefore it is ordered;

Student is authorized to proceed In Forma Pauperis and is not required to pay filing fees and related costs.

Dated November 2, 1995

s/s
Elizabeth Thompson
Hearing Review Officer

STATE OF MINNESOTA)

) AFFIDAVIT OF SERVICE
COUNTY OF RAMSEY) BY MAIL

Elizabeth S. Thompson, of the City of St. Paul, County of Ramsey, in the State of Minnesota being duly sworn, says that on the 2nd day of November, 1995, she served the annexed ORDER;

Sonja D. Kerr
Attorney at Law
790 Cleveland Ave. So.
Suite 214
St. Paul, Minnesota 55116

Kevin J. Rupp
Attorney at Law
Ratwik, Roszak,
Bergstrom, & Maloney, P.A.
300 Peavey Bldg.
730 Second Avenue South
Minneapolis, Minnesota 55402

Ann Schluter
Acting Commissioner of Education
Minnesota Department of Education
Capitol Square Building
550 Cedar Street
St. Paul, Minnesota 55101

Bernard E. Johnson
Assistant Attorney General

Suite 1200
445 Minnesota Street
St. Paul, Minnesota 55101-2130

by mailing them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing same in the Shoreview, Minnesota Post Office, directed to said persons at the above stated address (es), the last known address (es) of said persons.

Subscribed and sworn to before me

this 2 day of November, 1995. s/ Elizabeth Thompson

s/Vickie Jauert
Notary Public

STATE OF MINNESOTA
IN COURT OF APPEALS

In The Matter of:

H. M., Student, **ORDER**

Relator, **#C7-95-2204**

vs.

Special School District No. 1,

Respondent,

Commissioner of Children, Families,
and Learning,

Respondent.

Considered and decided by Amundson, Presiding Judge, Crippen, Judge, and Willis, Judge.

BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND BECAUSE:

1. The determination challenged on appeal is based on the finding that H.M. did not reside in Special School District No. 1 when H.M. requested a due process hearing.

2. At the time of oral argument, counsel indicated that the residence of H.M. might change again, in the near future. The place of residence may affect this appeal.

IT IS HEREBY ORDERED:

1. On or before April 29, 1996, relator shall file an informal memorandum (with four copies and proof of service). The memorandum shall (a) indicate where H.M. now resides and (b) address the impact, if any, of current residence on this appeal.

2. Respondents may rile supplemental memoranda (with four copies and proof of service) by May 6, 1996. The memoranda shall be limited to the impact of relator's current residence on this appeal.

Dated: April 20, 1996

BY THE COURT

s/s
Roland C. Amundson
Presiding Judge

CLL:blm

This opinion will be unpublished and may not be cited except as provided by Minn.Stat. § 480A.08, subd. 3 (1994).

STATE OF MINNESOTA
IN COURT OF APPEALS
C7-95-2204

In the Matter of: H.M., Student,
Relator,

vs.

Special School District No. 1,
Respondent,

Commissioner of Children, Families, and Learning,
Respondent.

Filed May 14, 1996
Reversed and remanded
Willis, Judge

Minnesota Department of Children, Families, and Learning
Agency File No. 69-2104-9817-3

Sonja Kerr, James Mortenson, Suite 214, 790 Cleveland Avenue South, St. Paul, MN 55116 (for Relator)

Kevin J. Rupp, Nancy E. Blumstein, Ratwick, Roszak, Bergstrom & Maloney, P.A., 300 Peavey Building, 730 Second Avenue South, Minneapolis, MN 55402 (for Respondent Special School District No. 1)

Hubert H. Humphrey, III, Attorney General, Bernard E. Johnson, Assistant Attorney General, 1200 North Central Life Tower, 445 Minnesota Street, St. Paul, MN 55101 (for Respondent Commissioner of Children, Families, and Learning)

Considered and decided by Amundson, Presiding Judge, Crippen, Judge, and Willis, Judge.

UNPUBLISHED OPINION

WILLIS, Judge

H.M. requested a due process hearing from the Department of Education (Department),[1] alleging that the respondent school district (district) had failed to provide him with a free appropriate public education (FAPE). A hearing officer denied H.M.'s hearing request because H.M. no longer resided in the district. A hearing review officer affirmed the hearing officer's decision. We reverse and remand for a hearing.

FACTS

H.M. is a child with disabilities, entitled to receive special educational services pursuant to the federal Individuals with Disabilities Act (IDEA) and Minnesota's special education laws. H.M. moved into the district with his parents in January 1991, when H.M. was in the seventh grade. The district provided H.M. with special educational services for several years.

In May 1995. H. M. was committed into the custody of the Minnesota Correctional Facility in Red Wing, outside the

[1] In 1995, the Department of Education was abolished, and its duties and employees were transferred to the Department of Children, Families, and Learning. Minn. Stat. § 119A.01, subd. 1 (Supp. 1995).

district. Shortly after his removal to Red Wing, H.M. asked the Department for a due process hearing. H.M. claimed that he was not receiving an appropriate program of special education from the Department of Corrections. H.M. also claimed that he had not received an appropriate program of special education while he resided in the district.

H.M. claimed that the Department of Corrections and the district had failed to assess him accurately and completely, had failed to provide him with appropriate services for his learning disabilities, and had failed to provide him with an appropriate individualized education plan (IEP), mandated by the IDEA and Minnesota's special education laws. *See* 20 U.S.C. § 1414 (a)(5) (1994); Minn. Stat. § 120.17, subd. 3a (1) (1994). H.M. requested a proper IEP, four years of compensatory education, and reimbursement for educational and related expenses.

A hearing officer was appointed to conduct a due process hearing. In July 1995, the hearing officer bifurcated the proceedings and scheduled two hearings, one involving the Department of Corrections and another involving the district. The hearing officer dismissed the hearing involving the district, concluding that he lacked jurisdiction over the matter because H.M. was not currently residing in the district.[2] A hearing review officer affirmed the hearing officer's decision.

DECISION

1. "The agency and all parties to the proceeding before it shall have the right to participate in the proceedings for review." Minn. Stat. § 14.64 (1994). The State Board of Education was not a party to the proceedings below;

[2] The hearing officer did not dismiss the due process hearing involving the Department of Corrections.

therefore, we grant the attorney general's motion to dismiss the board as a party.

2. The record in this matter closed on August 11, 1995. H.M. has appended to his brief an affidavit dated Sept. 12, 1995, after the record was closed. That material is stricken because this court may not consider extra-record evidence on appeal. *Chahla v. City of St. Paul*, 507 N.W.2d 29, 33 (Minn. App. 1993), *review denied* (Minn. Dec. 14, 1993).

3. H.M. argues that the decision to dismiss his due process hearing was affected by error of law and unsupported by substantial evidence. *See* Minn. Stat. § 14.69 (d), (e) (1994) (stating scope of judicial review). We agree.

While H.M. was at Red Wing, the Department of Corrections. not the district, was required to provide H.M. with a FAPE. Minn. Stat. § 120.17. subd. 7 (1994).[3] But H.M. does not claim that the district was required to provide him with an education while he was at Red Wing. Rather, H.M. claims that the district failed to provide him with appropriate educational services while he attended school in the district. H.M. has stated a claim for "compensatory education." i.e., remedial educational services beyond the time the district's obligations to him would otherwise cease. *See* Minn. Stat. § 120.17, subd. 1 (limiting district's special education obligations "until September 1 after the child with disability becomes 22 years old").

Compensatory education is intended to provide a remedy for a past denial of FAPE. *See Miener v. Missouri*, 800 F.2d 749, 753 (8th Cir. 1986) (authorizing recovery of compensatory educational services if FAPE is denied). The

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[3] If it were determined that H.M. could benefit from public school enrollment, however. the school district where the Red Wing facility is located would be responsible for educating H.M. Minn. Stat. § 120.17, subd. 7(c)(2). That school district would then charge respondent district for the cost of providing H.M.'s education. *Id.*

purpose of compensatory education has been described as follows:

> We do not believe that Congress intended to create a right without a remedy. If, in this case, we do not allow an award of compensatory education, then [the student's] right to an education between the ages of three and twenty-one is illusory. [The student] cannot go back to his previous birthdays to recover and obtain the free education to which he was entitled when he was younger.

Burr v. Ambach, 863 F.2d 1071. 1078 (2d Cir. 1988). *See* Perry A. Zirkel, *The Remedy of Compensatory Education Under the IDEA*, 95 Educ. L. Rep. 483 (1995) (stating that compensatory education under the IDEA is "becoming 'the coin of the realm' in terms of relief in meritorious cases").

The hearing review officer concluded that H.M. was not entitled to a due process hearing because he did not reside in the district. The hearing review officer cited *Monahan v. Nebraska*, 687 F.2d 1164 (8th Cir. 1982), *cert. denied*, 460 U.S. 1012 *(1983): Byrd v. Independent Sch. Dist. No. 11*, No. 3-95-139 (D. Minn. Mar. 23, 1995), and *Wakefield Pub. Sch.*, 20 Indivs. Disab. Educ. L. Rep. (LRP Pub.) 592 (Mass. Office Admin. Hr'g Oct. 15, 1993). None of the cited cases involved claims for compensatory education.

The hearing review officer also cited a decision by another hearing review officer involving similar facts. *In re W.S.*, OAH No. 52-2103-9816-3 (Minn. Office Admin. Hr'g Aug. 4, 1995). We have given due consideration to the analysis in W.S., but do not find it persuasive. *See Sevcik v. Commissioner of Taxation*, 257 Minn. 92, 103, 100 N.W.2d 678, 686 (1959) ("while administrative construction of statutes of doubtful meaning may be persuasive, it does not preclude a different construction by the courts").

In *Miener,* the Eighth Circuit Court of Appeals addressed a student's claim for compensatory education, even though the student had moved out of the district during the pendency of the proceedings. The court concluded that the student could properly request compensatory educational services to replace the services that the district had been required to provide. 800 F. 2d at 756, *see also Frith v. Galeton Area Sch. Dist.*, 900 F. Supp. 706. 719 (M.D. Pa. 1995) (concluding that student was required to exhaust administrative remedies under the IDEA, including claims for compensatory education, against two former school districts), *Gerasimou v. Ambach,* 636 F. Supp. 1504, 1511 (E. D. N.Y. 1986) (stating that student's claim against district for cost of prior educational services was not rendered moot when student moved out of the district).

In Lester H. v. Gilhool, the Third Circuit addressed a district's argument that it would be premature to award compensatory education to a student who was currently attending an out-of-state facility:

> The injury has been done and although the exact contours of the appropriate remedy may not be ascertainable now, [the student's] injury certainly could be, and was, ascertained.
>
> * * * [H]ere the district court did not speculate. It conceded that it was unable to predict [the student's] future educational needs, and wisely left the "form or components of the instructional program" to be determined, once [the student] reaches age 21, by the collective effort of school officials, parents and professionals. * * * In short, now is the most convenient time for all parties to present evidence as to whether [the student] received an appropriate placement, whether one was available, and the extent

> of the efforts made by the School District to find an appropriate placement.

916 F.2d 865, 868-69 (3d Cir. 1990), *cert. denied*, 499 U.S. 923 (1991). A similar analysis is appropriate here, if it is determined that the district denied H.M. the FAPE to which he was entitled.

Under Minnesota law, a due process hearing must be "initiated and conducted by and in the school district responsible for assuring that an appropriate program is provided * * * if the parent or guardian continues to object to * * * the **proposed** denial or removal of special education services for their child." Minn. Stat. § 120.17, subd. 3b(e) (1994) (emphasis added).

The hearing review officer concluded that because the district was not responsible for H.M.'s current or "proposed" program of education while he was at Red Wing, the hearing officer lacked jurisdiction to require the district to participate in a due process hearing But as one commentator has stated:

> [C]ourts cannot provide a sensible rationale to separate what is "prospective" from what is "retroactive," at least in the case of CES [compensatory educational services].

Mark H. Van Pelt, *Comment, Compensatory Educational Services and the Education for All Handicapped Children Act*, 1984 Wis. L. Rev. 1469, 1492 (1984). Thus, we reject the distinction between "proposed" and "retroactive" services in the context of compensatory education.[4] Under Minnesota

[4] Indeed, we could construe the facts of this case as a "proposed" action by the district; H.M. has requested that the district be required, in the future, to provide him with four years of compensatory education and reimbursement for educational and related expenses.

law, H.M. is entitled to a due process hearing to address his claims for compensatory education from the district.

Our decision is supported by the fact that the legislature has provided for a due process hearing "initiated and conducted by and in the school district responsible for assuring that an appropriate program is provided." Minn. Stat. § 120.17, subd. 3b(e). The district is responsible for assuring that any mandated compensatory education is provided to H.M.

Finally, we note that the legislature has named the individuals and entities that may be parties to a due process hearing. Those parties include "[t]he child's school district of residence, a resident district. and providing district * * * ." *Id.*, subd. 3b(1). "School district of residence" is defined as "the district in which the child's parent resides * * * ." *Id.*, subd. 6(a). During H.M.'s placement at Red Wing, H.M.'s parents continued to reside in the district.[5]

We have not arrived at our decision without difficulty. We are fully aware of the expense and time involved in conducting and participating in a due process hearing. *See generally* Perry A. Zirkel, *Over-Due Process Revisions for the Individuals with Disabilities Act, 55* Mont. L. Rev. 403, 403-14 (1994). Despite these concerns, we believe that a hearing is necessary, and was necessary even while H.M. was at Red Wing, to determine whether the district must compensate H.M. for a past denial of the education to which he is entitled. Our conclusion, however, is based on an assumption that

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[5] After oral argument, we requested supplementary briefing on the issue of whether any change in H.M.'s residence had made this appeal moot. We were notified that H.M. has been paroled from Red Wing and has returned to the district. Nevertheless, the par-ties have urged us to decide this matter because, for example, there is a possibility that H.M.'s parole could be revoked. We agree that the matter is not moot because the issue of H. M.'s entitlement to a hearing is "capable of repetition but likely to evade review." *Elzie v. Commissioner of Pub. Safety,* 298 N.W.2d 29, 32 (Minn. 1980).

H.M. still desires the relief he sought in the proceedings under review and that he intends to take advantage of any services that might be awarded as the result of a due process hearing.

Reversed and remanded.

Dated: May 8, 1996

s/s
Judge Bruce D. Willis

12-2104-9817-3

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR SPECIAL SCHOOL DISTRICT NO. 1

In the Matter of H.M. and Special School District No. 1	**ORDER DETERMINING LACK OF JURISDICTION PENDING ENTRY OF JUDGMENT**

The above-entitled matter is before Administrative Law Judge Steve M. Mihalchick, acting as Hearing Officer in this matter, pursuant to the School District's request that the due process hearing in this matter be stayed pending determination of the Minnesota Supreme Court on the School District's intended Petition for Review.

Sonja D. Kerr, Attorney at Law, 5972 Cahill Avenue, Suite 110, Inver Grove Heights, Minnesota 55076, appeared on behalf of the Student H.M. Kevin J. Rupp and Nancy E. Blumstein, Ratwik, Rozak & Maloney, P.A., 300 Peavey Building, 730 Second Avenue South, Minneapolis, Minnesota 55402, appeared on behalf of Respondent Special School District No. 1.

Based upon the record herein and for the reasons stated in the following Memorandum, the Hearing Officer makes the following:

ORDER

IT IS HEREBY ORDERED that:

1. The Hearing Officer lacks jurisdiction in this matter until entry of judgment of the May 14, 1996 Court of Appeals'

decision in this matter or a subsequent Supreme Court decision in the matter.

2. Since the Hearing Officer is presently without jurisdiction in this matter, the Hearing Officer will conduct no proceedings and take no action regarding the matter.

3. The parties shall continue to advise the Hearing Officer of the progress of the School District's Petition for Review of the Court of Appeals' decision.

Dated this 30th day of May 1996.

s/s
STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

On June 7, 1995, the Student requested a due process hearing under the Federal Individuals with Disabilities Education Act for issues involving the special education of the Student by the School District. At that time, the Student was residing at the Minnesota Juvenile Correction facility at Red Wing, which thereby had responsibility for his education. The School District moved for dismissal on the grounds that it was no longer the Student's school of residence. On August 15, 1995, the Hearing Officer dismissed the Student's hearing with the School District for lack of jurisdiction.

On September 20, 1995, a Hearing Review Officer affirmed the dismissal. On October 16, 1995, the Student filed a Petition for a Writ of Certiorari with the Minnesota Court of Appeals appealing the dismissal. On May 14, 1996, the Court

of Appeals reversed the Hearing Review Officer's decision and remanded the matter for hearing on the compensatory education issue.

On May 16, 1996, the Hearing Officer wrote the parties seeking to schedule a prehearing conference. The School District responded by stating that it intended to seek review of the Court of Appeals' Opinion and requested that the due process hearing be stayed pending the appeal.

At the request of the Hearing Officer, the parties submitted briefs on the matter which were received May 28, 1996. The record was closed at that time.

This matter appears to be controlled by Minn. R. Civ. App. Pro. 136.02, which provides:

> Unless the parties stipulate to an immediate entry of judgment, the Clerk of the Appellate Courts shall enter judgment pursuant to the decision or order not less than 30 days after the filing of the decision or order. The service and filing of a petition for review to, or rehearing in, the Supreme Court shall stay the entry of the judgment. Judgment shall be entered immediately upon the denial of a Petition for Review or Rehearing.

Until entry of judgment, the decision of the Court of Appeals issued on May 14, 1996, is not effective or final. Until that occurs, the status quo is that the matter has been dismissed by the Hearing Officer and that decision has been affirmed by the Hearing Review Officer. Thus, at the current time, the Hearing Officer has no jurisdiction in the matter and can take no action of any sort. In re Stilinovich, 479 N.W.2d 731, 736 (Minn. App. 1992); Hoyt Investment Co v. Bloomington Commerce and Trade Center Assoc., 421 N.W.2d 735, 739 (Minn. App. 1988).

The Student has cited Letter to Kerr, 22 IDELR 365 (OSEP 1995), and the provisions of Minnesota Rules that limit the authority of the hearing officer to grant extensions of time or to continue due process hearings. However, those are not strictly applicable in this situation because, at the present time, the due process hearing has been dismissed and nothing is being continued.

This situation is different from those cases in which a hearing officer has ordered a school district to provide certain special education and the district has appealed. In those cases, under Minnesota Rules and most other court rules, the district must seek a stay of the hearing officer decision pending the appeal, either from the hearing officer or from the Appellate Court. Such stays may or may not be granted depending upon the equities of the situation and the needs of the student. But that is not the situation here; the matter stands dismissed and there is nothing to stay at the hearing level.

S. M. M.

STATE OF MINNESOTA
IN COURT OF APPEALS

In The Matter of:
H. M., Student,

Relator,

vs.

Special School District No. 1,

Respondent,

Commissioner of Children, Families, and Learning,

Respondent.

ORDER

#C7-95-2204

Considered and decided by Amundson, Presiding Judge, Crippen, Judge, and Willis, Judge.

BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND BECAUSE:

1. On May 14, 1996, we issued an unpublished opinion in this matter. Relator and respondent Commissioner of Children, Families, and Learning have submitted letters requesting clarification of our opinion. The parties' letters do not comply with Rule 127 of the Minnesota Rules of Civil Appellate Procedure, which provides that a request for relief from this court "shall be made by serving and filing a written

motion for the order or relief." Nonetheless, in the interests of judicial economy, we will address the parties' requests.

2. In our May 14, 1996, opinion, we dismissed the State Board of Education (SBE) as a party to the appeal because SBE was not a party to the proceedings below. The parties did not ask us to dismiss the Commissioner of Children, Families, and Learning as a party to the appeal, and our opinion did not dismiss the Commissioner.

3. Relator has requested that we publish our May 14, 1996, opinion. We have already made a determination that the opinion should not be published. See Minn. Stat. § 480A.08, subd. 3 (1994).

4. Relator has also requested that we decide whether our opinion may be published in the Individuals with Disabilities Education Law Reporter. Relator has cited no authority for us to decide whether a copy of our opinion may be included in a private publication.

IT IS HEREBY ORDERED:

1. Relator's request that we publish our May 14, 1996, opinion is denied.

2. Relator's request that we decide whether our opinion may be published in the Individuals with Disabilities Education Law Reporter is denied.

Dated: June 7, 1996

BY THE COURT

s/s

The Honorable Bruce D. Willis
Opinion Judge

BDW/jb

STATE OF MINNESOTA
IN SUPREME COURT
C7-95-2204

In the Matter of: H. M. Student,

Relator,

vs.

Special School District No. 1,

Respondent,

Commissioner of Children, Families and Learning,

Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Special School District No. 1 for further review be, and the same is, denied.

IT IS FURTHER ORDERED that the request of Commissioner of Children, Families and Learning to serve and file a brief as amicus curiae is accordingly denied.

Dated: July 10, 1996

BY THE COURT:

s/ A.M. Keith
Chief Justice

STATE OF MINNESOTA

In the Matter of: H.M., Student, Relator,

vs.

Special school District No. 1, Respondent,

Commissioner of children, Families, and Learning, Respondent.

☐ Supreme Court

☒ Court Of Appeals

JUDGMENT

C7-95-2204

Appellate Court Case Number

69210498173

Trial Court Case Number

Pursuant to an order of Court heretofor duly made and entered in this cause it is determined and adjudged that the decisions of the Commissioner of Minnesota Department of Children, Families, & Learning dated Sept 20 & 26, 1995 *be and the same hereby is* reversed and remanded in accordance with unpublished opinion

and that judgment be entered accordingly. A certified copy of the entry of judgment and the Court's decision is herein transmitted and made part of the remittitur.

Dated and signed: FOR THE COURT Sept. 10, 1996
Dated

By: s/s
Assistant Clerk

12-2104-9817-3

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR SPECIAL SCHOOL DISTRICT NO. 1

In the Matter of H.M. and	**ORDER DENYING FURTHER STAY**
Special School District No. 1	**OF DUE PROCESS HEARING**

The above-entitled matter is before Administrative Law Judge Steve M. Mihalchick, acting as Hearing Officer in this matter, pursuant to the School District's request that the IDEA hearing in this matter be further stayed pending a writ of certiorari to the U.S. Supreme Court to review the determination of the Minnesota courts in this matter.

Sonja D. Kerr, Attorney at Law, 5972 Cahill Avenue, Suite 110, Inver Grove Heights, Minnesota 55076, appeared on behalf of the Student H.M. Kevin J. Rupp, Ratwik, Rozak & Maloney, P.A., 300 Peavey Building, 730 Second Avenue South, Minneapolis, Minnesota 55402, appeared on behalf of Respondent Special School District No. 1.

Based upon the record herein and for the reasons stated in the following Memorandum, the Hearing Officer makes the following:

ORDER

IT IS HEREBY ORDERED that:

1. The School District's request for a stay of the remanded local due process hearing pending review by the U.S. Supreme Court is DENIED.

2. The hearing in this matter will be held October 21-22, 1996, commencing at 9:00 a.m. in Minneapolis. The School District will arrange an appropriate location for the hearing and secure a court reporter.

3. The Student shall serve and file a Statement of Objections setting forth his objections to the School District's program for which compensatory education is sought by September 27, 1996. The School District will serve and file a response thereto within five days of receipt of the Statement of Objections.

4. The parties will serve and file copies of all exhibits they intend to introduce and a list of all witnesses they intend to call five days prior to the hearing.

Dated this 16th day of September, 1996.

s/s
STEVE M. MIHALCHICK by AWK
Administrative Law Judge

MEMORANDUM

On June 7, 1995, the Student requested a due process hearing under the Federal Individuals with Disabilities Education Act (IDEA) for issues involving the special education of the Student by the School District. At that time, the Student was residing at the Minnesota Juvenile Correction

facility at Red Wing, which thereby had responsibility for his education. The School District moved for dismissal on the grounds that it was no longer the Student's school of residence. On August 15, 1995, the Hearing Officer dismissed the Student's hearing with the School District for lack of jurisdiction.

On September 20, 1995, a Hearing Review Officer affirmed the dismissal. On October 16, 1995, the Student filed a appeal of the dismissal with the Minnesota Court of Appeals. On May 14, 1996, the Court of Appeals reversed the Hearing Review officer's decision and remanded the matter for hearing on the issue of compensatory education.

The School District then filed a Petition for Review with the Minnesota Supreme Court and also requested that the IDEA hearing that had been remanded by the Court of Appeals be stayed pending a decision from the Minnesota Supreme Court on the Petition for Review. On May 30, 1996, the Hearing Officer issued an order finding that he lacked jurisdiction while the Petition for Review was pending and directing the parties to advise the Hearing Officer of the progress of the Petition for Review.

On July 10, 1996, the Minnesota Supreme Court denied review. However, neither party advised the Hearing Officer. The Hearing Officer first learned of the denial on August 28, 1996, when he received a copy of a letter from counsel for the Student to counsel for the School District that contained an indication that review had been denied. The Hearing Officer then contacted both counsel. Counsel for the School District indicated that the School District had just approved an appeal to the U.S. Supreme Court and requested that the IDEA hearing be further stayed pending that appeal.

At the request of the Hearing Officer, the parties submitted briefs on the matter, which were received August 29 and September 7, 1996. The record was closed on September 7, 1996.

The School District is now in the process of preparing a petition for review which it says will be filed by the October 10, 1996, deadline. The School District argues that it has good legal grounds for its appeal and that the Hearing Officer should exercise his discretion to stay the IDEA hearing until the appeal is resolved.

In the case of the Petition for Review to the Minnesota Supreme Court, the Hearing Officer was without jurisdiction to proceed in the matter until the Petition was denied. The situation is now different. The petition was denied and the matter has been remanded for an IDEA hearing on the compensatory education issue. The Hearing Officer now has jurisdiction to proceed with the hearing.

Under 28 U.S.C. § 2101(f), the enforcement or judgment of the court being appealed "may" be stayed for a reasonable time, by the court rendering the judgment or decree or by a Justice of the U.S. Supreme Court, to enable the party to obtain a writ of certiorari from the U.S. Supreme Court. As the Student points out, it appears that any request for a stay of the Court of Appeals order remanding the case for hearing should now be directed to the Minnesota Court of Appeals.

Since the Hearing Officer cannot grant a "stay" of the Court of Appeals decision, the School District's request must considered as a request for an extension of the 45 day deadline in which IDEA hearings must be held. The School District argues that the legal merit of its appeal and the lack of prejudice to the Student weigh in favor of an extension. The Student disagrees.

The likelihood of the U.S. Supreme Court granting review must be considered by courts considering a motion for a stay pending appeal to the U.S. Supreme Court. *Scott v Platt,* 171 Or. 379, 137 P.2d 975 (1943). The likelihood of the U.S. Supreme Court granting review also seems to be an appropriate, though less important consideration for granting a delay of an IDEA hearing such as in this case. It is less

important because the failure to fairly promptly determine and provide the appropriate compensatory education for the Student outweighs the harm of forcing the School District to incur the cost of the IDEA hearing and of providing that compensatory education, even if it is subsequently determined not to have been legally required.

The School District cites two recent federal District Court decisions that have declined to follow the Court of Appeals decision in this case and have criticized it as being unpersuasive. *Thompson v Special School District No. 1*, 3-95-1083 (D. Minn. Filed July 31, 1996) and *Smith v Special School District No. 1*, 4-96-685(D. Minn. Filed August 12, 1996). The fact that the federal courts disagreed with the Court of Appeals does not create any significant likelihood that the Supreme Court will take the case. The case was not considered significant enough by the Court of Appeals to issue a published opinion that would have had precedential value, so the U.S. Supreme Court has no concern about correcting precedents, The issue of whether a Student may seek compensatory education from a former school district under IDEA is an issue of interest in the special education community, but it does not seem to be an issue that the Supreme Court would particularly want to address. Finally, there has not been a final decision in this case; it has been remanded for hearing. Appellate courts generally only grant review of final decisions. The reason for that is illustrated by this case. It is possible that it will ultimateiy be determined that the School District did not fail to provide a free, appropriate education or that any failure was minor and that the Student is entitled to little or no compensatory education. It is also possible that it will be determined that he is entitled to compensatory education. At that point the School District would have something to appeal; at this point it does not. Thus, it seems unlikely to the Hearing Officer that the U.S. Supreme Court will grant review in this case at this stage.

The School District argues that the Student will suffer little prejudice if the IDEA hearing is delayed because he has no unmet educational needs. It cites the fact that he has had two IDEA hearings with the Department of Corrections since the hearing in this matter was commenced and, since he has now returned to the School District, is now in the process of scheduling yet another IDEA hearing concerning his current educational program in the School District. The Student argues that the other cases are irrelevant to his claim for compensatory education from the School District and points out that the one case that awarded some compensatory education from the Department of Corrections is being appealed, so the Student is yet to receive any relief.

The Hearing Officer believes that IDEA was designed so that a student's educational needs would be met by his or her current IEP, including any needs that arose because of past failures of any school to deliver an appropriate education. The concept of compensatory education, particularly from a former school district, runs contrary to that. It would be best if all of the Student's needs, including the need for any compensatory education, were addressed in his current IEP. Nonetheless, the Court of Appeals has remanded this matter for hearing on whether there were past failures by the District and whether the Student is entitled to any compensatory education for such failure. Since that needs to be determined, it should be done promptly. The Student is now 18 years old. The matter should be decided as soon as possible.

The Hearing Officer has a very full calendar. It is necessary to set the hearing for October 20 and 21, 1996, at 9:00. Two days should be sufficient for the limited issue presented. The Hearing Officer would suggest that the parties agree to have the compensatory education issue heard by the hearing officer hearing the case involving the Student's current educational plan.

Minnesota Children
Minnesota Department of Children, Families & Learning

612/296-6946

September 24, 1996

Kevin Rupp, Esq.
Nancy Blumstein, Esq.
Brian Maguire, Esq.
Ratwik, Roszak & Maloney, P.A.
300 Peavey Building
730 Second Avenue South
Minneapolis, MN 55402

Re: H.M. and Special School District No. 1

Dear Mr. Rupp, Ms. Blumstein, and Mr. Maguire:

The Commissioner of the Minnesota Department of Children, Families and Learning has received you letter requesting the appointment of a hearing review officer to review Hearing Officer Mihalchick's denial to stay the hearing in the above referenced matter. The Commissioner does not have jurisdiction to appoint a hearing review officer in this instance, because the denial of the stay is not an appealable order. Therefore, the Commissioner is not granting your request to appoint a hearing review officer.

In addition, the Commissioner has also received your motion requesting he grant a 90 day stay of the level one hearing. The Commissioner does not have jurisdiction to stay this hearing for 90 days as requested. There are no provisions in IDEA or Minnesota Statute 120.17 which authorize the Commissioner to stay a hearing. Therefore, your request for a stay is denied.

Sincerely,

s/s

A. W. Ciriacy, Jr.
Due Process Specialist
Division of Monitoring and Compliance

AWC/tcs

cc: Sonja Kerr, Attorney for Parent(s)
Steve Mihalchick, Hearing Officer

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

LEROY THOMPSON, a minor, by and through his parent and legal guardian, SYNARVIA JENE BUCHANON,

Plaintiff,

v.

Civil3-95-1083

ORDER

BOARD OF THE SPECIAL SCHOOL DISTRICT NO. 1, (Minneapolis), PETER HUTCHINSON, in his official capacity as Superintendent, BRUCE JOHNSON, in his official capacity only as Commissioner of the Minnesota Department of Children, Families and Learning (MDCFL), MDCFL, and BOARD OF EDUCATION, sued as Minnesota State Board of Education,

Defendants.

Kerr Law Office, by SONJA D. KERR, Inver Grove Heights, MN, for Plaintiff, and

Ratwik, Roszak, Bergstrom & Maloney, by STEPHEN ANDERSON, NANCY E. BLUMSTEIN, and PAUL RATWICK, Minneapolis, MN, for Defendants Peter Hutchinson and Special School District. No. 1, and

RACHEL KAPLAN, Assistant Minnesota Attorney General, St. Paul, MN, for Defendants Bruce Johnson, MDCFL, and the Board of Education.

The above-entitled matter came before the Court for hearing on June 6, 1996 upon the motion of Defendants Peter Hutchinson and Special School District No. 1 ("SSD1") to dismiss all of Plaintiff Thompson's ("Thompson") claims (docket no. 24) and the motion of Defendants Bruce Johnson, the Minnesota Department of Children, Families, and Learning ("MDCFL"), and the Minnesota State Board of Education ("SBE") to dismiss all of Thompson's claims (docket nos. 9 and 29).

Thompson asserts three claims against SSD1. First, he claims SSD1 violated his right to due process as guaranteed by the Fourteenth Amendment to the U.S. Constitution, 42 U.S.C. § 1983, Article XIII, Section 1 and the equal protection clause of the Constitution, the Individuals with Disabilities Education Act ("IDEA"), and M.S.A. §§ 120.01 11 and 120.17 by denying him a hearing to challenge the individualized education program ("IEP") and education SSD1 provided him while he was enrolled in the district. Second, he claims that SSD1 illegally discriminated against him because of Es race in violation of federal and state law by improperly disciplining him and denying him educational services. Third, he claims that SSD1 illegally discriminated against him because of his disability in violation of the Americans with Disability Act ("ADA"), the Rehabilitation Act, 29 U.S.C. § 794(a) and state law by failing to modify discipline policies to accommodate his disability. Thompson's prayer for relief asks the Court to order monetary damages and compensatory education.

With respect to Defendants Johnson, MDCFL, and the SBE, Thompson alleges that he was denied a due process

hearing in violation of the U.S. Constitution, and federal and state law, and he asks the Court to order administrative and legal measures to ensure that the state properly administers and enforces the educational scheme created by the IDEA.

The essential facts are not in dispute. Thompson is a 12 year-old African American who was enrolled in SSD1 schools from Kindergarten through approximately the first three months of fifth grade. Thompson left the school district when his mother, Synarvia Jene Buchanon ("Buchanon"), enrolled him in the Minneapolis Community Learning Center

(MCLC), a charter school. He began at MCLC December 13, 1994 and completed the fifth grade there. In June 1995 Buchanon requested a due process hearing to challenge SSD1's assessment of Thompson's disability and the educational program it provided him during the time he was a student in the district. Thompson was not enrolled in a SSD1 school at the time. The matter was assigned to an independent Hearing Officer ("HO"). SSD1 moved for dismissal, arguing that because Thompson was not enrolled in a school within SSD1, it had no obligation to provide a hearing. On August 16, 1995 the hearing officer issued an order and memorandum adopting SSD1's position and dismissing the hearing for lack of jurisdiction. Thompson appealed the decision to a Hearing Review Officer ("HRO").

While awaiting a decision of the HRO, Buchanon enrolled Thompson in New Visions school, a charter school. On October 30, 1995 the hearing review officer affirmed the dismissal of the hearing. Shortly afterwards Thompson commenced this suit. Thompson completed the 1995-96 school year at New Visions. During oral argument Thompson's counsel acknowledged that Buchanon was satisfied with the education assessment and services Thompson received at New Visions and that she was not seeking a hearing on the education provided by New Visions.

I. STANDARD OF REVIEW

In considering a motion to dismiss, the Court assumes that well-pleaded factual allegations in the complaint are true and construes the complaint and all reasonable inferences arising from it most favorably to the pleader. Westcott v. City of Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990). The Court will grant a motion to dismiss if it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief. Id.

II. DUE PROCESS CLAIM

Thompson claims that his Fourteenth Amendment right to due process was violated when he was denied a hearing on his claim that SSD1 failed to provide him with a free appropriate public education (FAPE) and failed to develop an appropriate IEP while he was a student in SSD1 schools. It is well-established that the Fourteenth Amendment protects interests that a person has already acquired in certain benefits and that such benefits are created and their dimensions defined by federal or state laws. Board of Regents v. Roth, 408 U.S. 564, 576-577 (1971). Consequently, to show that his right to due process has been violated, Thompson must show that he was deprived of a protected interest. See Schneider v. U.S., 27 F.3d 1327 (8th Cir. 1994).

A cause of action is a property interest protected by the due process clause,[1] however Thompson cannot show that the IDEA creates a cause of action permitting a claim such as Es. Several courts have considered the extent to which the IDEA provides a claim for an alleged violation of the act. Courts have recognized that a claim for compensatory educational services is available to remedy the denial of FAPE. Burlington

[1] See id. at 1333.

School Committee v. Department of Education, 471 U.S. 359, 369 (1985); Miener v. State of Mo., 800 F.2d 749 (8th Cir. 1986). However, plaintiff cites no case nor has this Court's research revealed any holding that the IDEA creates a claim such as that sought here for damages arising out of an alleged past denial of FAPE by a school district formerly responsible for the disabled child's education. The statutory language in the IDEA demonstrates that Congress did not intend to create a damage remedy or "any type of educational malpractice action." Whitehead v. School Board for Hillsborough Co. Florida, 918 F. Supp 1515, 1518 (M.D. Florida 1996) (citing Anderson v. Thompson, 658 F.2d 1205, 1211 (7th Cir. 198 1)). The claim for which Thompson seeks a hearing is not a challenge to a current IEP or education program as in Burlington and Meiner. Thompson's claim is that a school district formerly responsible for his education violated its obligations under the IDEA to provide him with FAPE and therefore owes him a remedy. The Court finds such a claim like an "educational malpractice" action. As the Whitehead court noted, Congress did not intend to create such a cause of action in the IDEA, and therefore this Court finds Thompson cannot show that a night to due process was violated when his request for a hearing was denied.

Thompson also cannot show that the procedural safeguards established in the IDEA entitle him to a hearing on his claim against SSD1. The IDEA requires states to provide disabled children and their parents with certain procedural safeguards including an impartial due process hearing "to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. §§ 1415(b)(1)(E) and 1415(b)(2). Thompson asks the Court to interpret this provision and "any matter" broadly so as to include a complaint such as the one he raises against SSD1. The Court finds no legal authority to

support such an interpretation. The Supreme Court in Honig v. Doe noted that Congress' purpose in creating the procedural safeguards was to provide parents with an opportunity to consult with schools in the development of a disabled child's IEP and to participate in any subsequent assessment of its effectiveness. 484 U.S. 305, 311-3112 (1987).

The Seventh Circuit Court of Appeals drew a similar conclusion in Anderson v. Thompson and rejected the argument that "any matter" indicates a congressional intent to provide a remedy for damages. 658 F.2d at 1211. In Anderson the court found that what Congress intended was that a parent could bring any matter "concerning the educational situation of his child ... in order to obtain the appropriate educational placement." Id. Both Honig and Anderson indicate that "any matter" is not to be interpreted as Thompson suggests. Rather the phrase is to be understood to guarantee a hearing if a claimant wishes to challenge a current educational placement. Thompson did not request a hearing to challenge his current IEP or his current school program. The record shows that Thompson was not enrolled in an SSD1 school on June 7, 1995 when he requested a hearing. It also shows that he does not contest his current placement. Accordingly, the Court finds that Thompson has no night to a hearing under the IDEA.

Thompson also fails to show that he has a night to a due process hearing under Minnesota law. Minnesota, law requires that a school district provide the opportunity for parents to obtain an impartial due process hearing when they object to a proposed assessment, placement, transfer, addition or denial of educational services. M.S.A. § 120.17, subd. 3b (e)(l)-(5). Further-more, the statute prescribes that the hearing shall be "initiated and conducted by and in the school district responsible for assuring that an appropriate program is provided." M.S.A. §120.17,subd.3b(e). The hearing Thompson requested was neither for one of the objections

listed in the statute nor in the school district responsible for his education, Thompson requested a hearing for a past denial of FAPE. Such an objection is not among those listed in the statute. Also, the record shows that Thompson was not enrolled in an SSD1 school at the time he requested a hearing. Prior to making the request he was enrolled in MCCL and subsequently he was enrolled in New Visions. Both schools are charter schools, and according to Minnesota law they are responsible, not SSD1, for assuring that an appropriate program is provided to disabled children. M.S.A. § 120.064, subd. 12. Thompson claims that a recent unpublished decision from the Minnesota State Court of Appeals, H.M. vs. Special School Dist. No. 1, (Unpublished Slip Op., May 14, 1996), establishes a right to a hearing on "retroactive services". The Court has carefully reviewed the decision in H.M. and notes that pursuant to M.S.A. § 480A.03 it is not controlling. H.M. offers no legal authority to support its conclusion and the Court finds this decision unpersuasive.

As the Court Ends no basis under federal or state law on which to conclude that Thompson had a right to a due process hearing, his due process claim must be dismissed. The Court also finds no facts or law that would entitle Thompson to relief on this claim under 42 U.S.C. § 1983, Article XIII, section 1 or the Equal protection clause of the Minnesota Constitution, M.S.A. §§ 120.0111 or M.S.A. § 120.17 and therefore Count I of Thompson's amended complaint will be dismissed.

III. RACE & DISABILITY DISCRIMINATION CLAIMS

SSD1 argues that Thompson must exhaust his administrative remedies before bringing his claims for race and disability discrimination and that because he did not have a hearing the claims must be dismissed. The Court finds SSD1's argument without merit. Thompson did request a due process

hearing from SSD1 and when his request was denied he appealed the decision without success. It is nonsensical for SSD1 to try and maintain that Thompson must have a hearing on his claims before he can initiate a suit and at the same time insist that Thompson has no night to a hearing. Furthermore, while the IDEA requires that a claimant exhaust administrative remedies and request a due process hearing on non-IDEA claims that seek relief available under the IDEA before commencing a cause of action, under certain circumstances exhaustion is not required. See Mrs. W. Tirozzi, 832 F.2d 748, 756 (2nd Cir. 1987). The Court finds that the instant case presents those circumstances under which exhaustion is not required. Although the Court would benefit from an administrative decision and the expertise of an administrative agency familiar with the education programs and special needs of disabled children, as the above discussion shows, the IDEA does not provide for a due process hearing on a claim such as Thompson's. It would be futile to require Thompson to request a hearing on his race and disability discrimination claims only to be denied a hearing. Exhaustion is not required when it would be futile to use the due process procedures. Id. Accordingly Thompson's race and disability claims cannot be dismissed for failure to exhaust administrative remedies. The Court finds the facts alleged sufficient to survive SSD1 and Hutchinson's motion to dismiss on the basis of statute of limitations and qualified immunity grounds and therefore SSD1 and Hutchinson's motion to dismiss Counts II and III is denied.

IV. CLAIMS AGAINST STATE DEFENDANTS

Thompson asserts two claims against MDCFL, the SBE, and Johnson. He claims that MDCFL violated the IDEA, the Fourteenth Amendment, 42 U.S.C. § 1983, and the Minnesota Constitution by failing to ensure that Thompson received a

due process hearing on his claims against SSD1 As discussed above, the Court finds that Thompson had no right to a hearing on his claims against SSD1 and that dismissing his request for a hearing was not in violation of Thompson's Fourteenth Amendment rights. Also, Thompson cannot establish a 42 U.S.C. § 1983 claim against these defendants. The Eleventh Amendment protects unconsenting states from a suit for damages brought in federal court, including claims brought under 42 U.S.C. § 1983. Hadley v. North Ark. Community Technical College, 76 F.3d 1437, 1438 (8th Cir. 1996); see Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989) (neither a state nor its officials acting in their official capacities are considered "persons" with respect to 42 U.S.C. § 1983). The claim against Johnson is against him in his official capacity as commissioner of MDCFL. The claims against MDCFL and SBE are actions against the state for purposes of Eleventh Amendment immunity. See Thomas v. FAG Bearings Corp., 50 F.3d 502, 505 (8th Cir. 1995) (suit seeking joinder of state's natural resources department is suit against state). Therefore the 42 U.S.C. § 1983 claim against these defendants cannot stand. Furthermore, the Eleventh Amendment bars a claim such as the one Thompson asserts based upon the Minnesota Constitution. Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 117 (1984) (suit based upon state law is barred when the relief sought has an impact directly on the state itself). Accordingly, Count IV of Thompson's amended complaint will be dismissed.

In his second claim, Thompson alleges that MDCFL and SBE have wrongfully created or interpreted state laws establishing a charter school system so as to deprive him of a hearing in violation of the Fourteenth Amendment, the IDEA, § 1983 and the education and equal protection clauses of the Minnesota Constitution. As the above analysis shows, Thompson has not established that he is entitled to a hearing under the IDEA or the Fourteenth Amendment and therefore

he cannot show the action dismissing his request for a hearing violated his rights. Moreover, as the above discussion shows the Eleventh Amendment bars Thompson's § 1983 claim. Also, as Thompson has not alleged any facts to show that MDCFL and SBE are not entitled to immunity under the Eleventh Amendment on his equal protection claim or other Minnesota Constitutional claim, Count V of Thompson's amended complaint must be dismissed.

Accordingly, upon review of all the files, records and proceedings herein,

IT IS HEREBY ORDERED that

1. Defendants SSD1 and Hutchinson's motion to dismiss with respect to Count I is GRANTED and Count I is DISMISSED.

2. Defendants SSD1 and Hutchinson's motion to dismiss with respect to Counts II and III is DENIED.

3. Defendants MDCFL, SBE, and Johnson's motion to dismiss Counts IV and V. is GRANTED and Counts IV and V are DISMISSED.

Dated: July 31, 1996.

s/s
DONALD D. ALSOP, Senior Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

William Smith, by and through his parent and legal guardian, Ada Townsend,

Plaintiff,

v.

Civil No. 4-96-685
MEMORANDUM OPINION AND ORDER

Special School District No. 1, (Minneapolis), and Peter Hutchinson, in his official capacity as Superintendent,

and

Bruce Johnson, in his official capacity only as Commissioner of the Minnesota Department of Children, Families and Learning,

Defendants.

Sonja D. Kerr, Esq., Kerr Law Office, Inver Grove Heights, Minnesota; and William A. Welp, Esq., Welp Law Office, Inver Grove Heights, Minnesota, for Plaintiff.

Paul C. Ratwik, Esq., Scott T. Anderson, Esq., and Nancy E. Blumstein, Esq., Ratwik, Roszak, Bergstrom & Maloney, Minneapolis, Minnesota, for Special School District No. 1 and Peter Hutchinson.

Rachel L. Kaplan, Esq., and Bernard E. Johnson, Esq., Minnesota Attorney General's Office, St. Paul, Minnesota, for Bruce Johnson, Commissioner.

Introduction

On December 11, 1995, Plaintiff William Smith ("Plaintiff Smith"), by and through his parent and legal guardian, Ada Townsend commenced this action under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.;* the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.;* § 504 of the 1973 Rehabilitation Act, 29 U.S.C. § 794; 42 U.S.C. §§ 1983 and 1985; and the Minnesota Human Rights Act against Defendants Special School District No. 1 ("SSD1") and Peter Hutchinson ("Hutchinson"), in his official capacity as Superintendent of SSD1, as well as against Bruce Johnson ("Johnson"), in his official capacity as Commissioner of the Minnesota Department of Children, Families, and Learning ("MDCFL"), alleging claims based on his treatment while a student as SSD1 Currently before the Court are Defendants SSD1's and Hutchinson's motion to dismiss and Defendant Johnson's separate motion to dismiss. For the reasons set forth below, the Court will grant each motion in part.

Background

I. Parties.

Plaintiff Smith is a disabled minor. See Complaint, ¶ 3. He has learning disabilities, a sleep disorder and emotional problems. Id. Ada Townsend is Plaintiff Smith's mother and legal guardian. Id.

Defendant SSD1 is the school district for the City of Minneapolis in Hennepin County, Minnesota. It is Minnesota's largest school district.

Defendant Hutchinson is a member of Public Strategies Group, Inc., a private corporation which has a unique contract to provide superintendent services to SSD1.

Defendant Bruce Johnson is the Commissioner of the MDCFL.[1] The MDCFL was created for the purpose of increasing the capacity of Minnesota communities to measurably improve the well-being of children and families. As part of its duties, the MDCFL through the Commissioner, appoints hearing review officers to conduct various hearings to ensure that appropriate programs are being provided for children with disabilities.

II. IDEA and Minn. Stat. § 120.17.

Under federal law, each handicapped child is entitled to a free appropriate public education ("FAPE"). See 20 U.S.C. § 1400(c). To achieve this goal, Minn. Stat. § 120.17, the state law through which the IDEA is implemented, provides that each school district shall provide special instruction and services for disabled children. See Minn. Stat. § 120.17, subd. 1. In determining the appropriate special instruction and services for a child, the district must develop an individualized education plan ("IEP") for the student. Id. at subd. 3a.

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[1] On October 1, 1995, the Minnesota Department of Education ("MDE") was incorporated into the newly created MDCFL. The terms MDCFL and MDE will be used interchangeably throughout this memorandum.

If a parent or guardian believes that a student is not receiving an appropriate special education program, the parent or guardian has a two-step administrative review process available to raise objections. At step one, the parent or guardian may request an impartial due process hearing. Id. at subd. 3b(e). This hearing, also known as a Level 1 hearing, takes place before an impartial hearing officer mutually agreed upon by the parent and school district or appointed by the Commissioner of the MDCFL if the parties cannot agree. See Minn. Stat. 120.17, subd. 3b(e). The decision of the hearing review officer must be rendered no more than 45 calendar days from the date of the receipt of the request for a hearing, unless an extension is granted pursuant to a request of the parties. Id. at subd. 3b(f).

If any party is dissatisfied with the hearing officer's decision, that party may appeal for a Level 2 hearing to a hearing review officer within 30 calendar days of the receipt of the initial written decision. Id. at subd. 3b(g). The hearing review officer is selected by the Commissioner. Id. at subd. 3b(i). The Level 2 proceeding is a review of the Level 1 decision, although additional evidence may be received if necessary. Id. at subd. 3b(g). The hearing review officer's decision must be rendered within 30 calendar days after the filing of the appeal.

If either party is dissatisfied with the Level 2 decision, that party may appeal the decision to the Minnesota Court of Appeals, pursuant to Minn. Stat. § 120.17, subd. 3b(h), or to Federal District Court, pursuant to 20 U.S.C. § 1415(e).

III. Facts of this Case.

Plaintiff William Smith is a student With disabilities. During the majority of his schooling,[2] Plaintiff was a student in

[2] Plaintiff was 17 years old at the time his request for a due process hearing was filed on June 7, 1995.

the Defendant SSD1. In October, 1994, he moved with his mother from a residence in Defendant SSD1 to one in Independent School District No. 271 (Bloomington School District). He insists he moved for the purpose of obtaining better educational services to meet his special education needs. See Complaint, at ¶6. He alleges he was denied a FAPE by SSD1 in several ways including: (1) being denied counseling services, despite being classified as having an emotional or behavioral disorder; (2) being dismissed, suspended and excluded from school on numerous occasions without being provided any educational services or being provided supplementary aides to reduce his suspensions and dismissals; (3) not having an IEP, or having an incomplete IEP until approximately seventh grade; and (4) not receiving a FAPE while incarcerated or involuntarily placed in programs located within the residential borders of SSD1. See Complaint, ¶¶ 7-10. He also alleges that despite his move to Bloomington, he continued to attend a technical college program in SSD1 during the full fall semester of the 1994-95 school year, during which time he had no IEP or an incomplete IEP. Id. at ¶11

On June 7, 1995, Plaintiff requested a special education due process hearing against both SSD1 and the Bloomington School District under Minn. Stat. § 120.17, subd. 3(b)(e) and the IDEA.

Hearing Officer Janice Frankman was appointed by the Commissioner to preside at the Level 1 hearing in both of Plaintiff's cases. At a prehearing conference on June 20, 1995, SSD1 moved for an order dismissing it as a party. See Frankman's Order Denying Motions to Dismiss at 1. Both the Bloomington School District and Plaintiff filed memoranda in opposition to SSD1's motion. Subsequently, on July 3, 1995, Frankman denied SSD1's motion to dismiss. At the same time, she bifurcated the hearing of the two cases to permit SSD1 to seek an interlocutory appeal. Id. at 2.

Thereafter, SSD1 sought the appointment of a Level 2 hearing review officer to review ALJ Frankman's denial of its Motion.[3] See Complaint, at ¶15. A Level 2 hearing review officer was then appointed by the MDCFL. Id. at ¶16. After SSD1 briefed the issues in its appeal and Plaintiff, by letter, challenged the hearing review officer's jurisdiction to hear the appeal, the hearing review officer issued her decision which determined that SSD1 had the right to an interlocutory appeal and which granted SSD1's motion to dismiss.

After an appeal to the Minnesota Court of Appeals was dismissed for lack of timely service, Plaintiff filed his Complaint in Federal Court.

Both Defendants SSD1 and Peter Hutchinson and Defendant Bruce Johnson have brought motions to dismiss. Defendants SSD1 and Peter Hutchinson raise five grounds in support of their motion to dismiss under Federal Rule of Civil Procedure 12(c).[4] They allege: (1) Plaintiff's claims are

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[3] It is apparent from her Order that Administrative Law Judge Frankman was told by the Minneapolis School District that her Order would be appealed to the District Court. It was not appealed to Federal District Court and instead was actually appealed through administrative channels for a Level 2 review. The propriety of this review is an issue to be resolved in this case.

[4] Defendants SSD1's and Hutchinson's motion to dismiss has been styled as a motion for judgment on the pleadings under Fed.R.Civ.P. 12(c). However, the motion is in actuality a motion for failure to state a claim upon which relief can be granted under Fed.R.Civ.P. 12(b)(6). However, because the motion was brought after their answer, they were unable to bring the motion under 12(b)(6). Nevertheless, Fed.R.Civ.P. 12(h)(2) specifically allows "[a] defense of failure to state a claim upon which relief can be granted. . . "to be made ". . . by motion for judgment on the pleadings. . ." See also Kornblum v. St Louis County, MO., 48 F.3d 1031, 1038 (8th Cir. 1995), Westcott v. City of Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990) and Taylor v. United States Internal Revenue Service, 915 F. Supp. 1015, 1017 (N.D. Iowa 1996). Moreover, a 12(c) motion is reviewed under the same standard as a 12(b)(6) motion. See Westcott, 901 F 2d at 1488, and Taylor, 915 F Supp at 1017-18.

precluded by res judicata; (2) Plaintiff's claims are untimely; (3) there is no subject matter jurisdiction over Plaintiff's IDEA claims; (4) Plaintiff's non-IDEA claims must be dismissed for failure to state a claim upon which relief may be granted; and (5) claims against Defendant Hutchinson must be dismissed for failure to state a claim upon which relief may be granted and qualified immunity. Meanwhile, in support of his 12(b)(6) motion, Defendant Johnson argues that Plaintiff's Complaint should be dismissed because: (1) it is untimely; (2) it is barred by res judicata; (3) even assuming that facts alleged are true, Plaintiff would not be entitled to any relief; (4) the MDCFL's dissemination of information to hearing review officers was not contrary to law; and (5) the MDCFL's parent procedural safeguards brochure provides adequate notice to parents and guardians.

This Court has jurisdiction to decide Plaintiff Smith's federal claims pursuant to 28 U.S.C. § 1331 and his state claims pursuant to 28 U.S.C. § 1367.

Discussion

I. Standard of Review.

In considering a motion to dismiss, the pleadings are construed in a light most favorable to the plaintiff, and the facts alleged in the complaint must be taken as true. Hamm v. Groose, 15 F.3d 110, 112 (8th Cir. 1994); Ossman v. Diana Corp., 825 F.Supp. 870, 879-80 (D. Minn. 1993). Any ambiguities concerning the sufficiency of the claims must be resolved in favor of the plaintiff. Ossman, 825 F.Supp. at 880. A complaint should be dismissed "only if it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations." Frey v. City of Herculaneum, 44 F.3d 667, 671 (8th Cir. 1995)(citations omitted). "A motion to dismiss should be granted as a

practical matter. . . only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." Id.

II. Res Judicata.

Both Defendants SSD1 and Hutchinson as well as Defendant Johnson allege that Plaintiff's Complaint should be dismissed on res judicata grounds. They allege that since essentially the identical claims were already dismissed by the Minnesota Court of Appeals, Plaintiff should not be able to relitigate in this forum.

Under Minnesota law, res judicata is considered "a finality doctrine which dictates that there be an end to litigation." Sondel v. Northwest Airlines, Inc., 56 F.3d 934, 937-38 (8th Cir. 1995), *quoting* Dorso Trailer v. American Body & Trailer, 482 N.W.2d 771, 773-74 (Minn. 1982). The doctrine states that:

> [a] judgment on the merits constitutes an absolute bar to a second suit for the same cause of action, and is conclusive between parties and privies, not only as to every other matter which was actually litigated, but also as to every matter which might have been litigated therein.

Id., *quoting* Dorso Trailer, 482 N.W.2d at 774. Moreover, a prior state court decision receives the same preclusive effect in federal court as it would receive in state court. See 28 U.S.C. § 1738.[5] However, "[r]es judicata

[5] § 1738 provides in pertinent part that: "[s]uch . . . judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." See also Charchenko v. City of Stillwater, 47 F.3d 981, 984 & n.3 (8th Cir. 1995).

should not be rigidly applied; rather; it focuses on whether its application results in an injustice against the party to be precluded." Sondel, 56 F.3d at 938.

The Eighth Circuit Court of Appeals has set forth a four-part test to determine when res judicata bars relitigation of a claim: (1) the first suit must result in a final judgment on the merits; (2) the first suit must be based on proper jurisdiction; (3) both suits must involve the same nucleus of operative facts; and (4) both suits must involve the same parties or their privies. Kolb v. Scherer Brothers Financial Services Co., 6 F.3d 542, 544 (8th Cir. 1993).

In this case, the only dispute between the parties is whether the Minnesota Court of Appeals's dismissal of Plaintiff's appeal as untimely was a final judgment on the merits. It is uncontroverted that this suit involves the same nucleus of operative facts as the prior appeal and that this suit involves the same parties or their privies. Thus, assuming no injustice to Plaintiff, if the prior dismissal was an adjudication on the merits, then this suit would be barred by res judicata.

In support of their argument, Defendants point to two factors. First, they assert that under Minnesota Rule of Civil Procedure 41.02(c), a dismissal for any reason other than for lack of jurisdiction, for forum non conveniens, or for failure to join a party indispensable pursuant to Rule 19, is a dismissal on the merits, unless the court specifies otherwise in its order. Second, they argue that the dismissal by the Minnesota Court of Appeals was most analogous to a dismissal based on statute of limitations grounds which has been determined to be a dismissal on the merits. See Nitz v. Nitz, 456 N.W.2d 450, 452-53 (Minn. Ct. App. 1990).

In opposition, Plaintiff contends that the dismissal was for want of jurisdiction which is not a dismissal on the merits. See Charchenko, 47 F.3d at 984-85 ("an involuntary dismissal by a court for lack of jurisdiction may not be a bar [to a subsequent

suit] if the jurisdiction's rule is patterned after Federal Rule of Civil Procedure 41(b)").

In deciding whether the prior dismissal was on the merits, the Court must look to the law of Minnesota. Kolb, 6 F.3d at 544. After the Level 2 hearing review officer dismissed Plaintiff's claims on August 4, 1995, he appealed the decision to the Minnesota Court of Appeals. Under Minn. Stat. § 120.17 subd. 3b(h), an appeal of a hearing review officer's decision to the Minnesota Court of Appeals must be in accordance with Minn. Stat. Ch. 14, the chapter concerned with administrative procedures. Under Minn. Stat. § 14.63, an aggrieved party seeking judicial review in the Minnesota Court of Appeals must file a petition for a writ of certiorari with the Court of Appeals and serve the petition on the state agency not more than thirty days after the party receives the final decision and order of the agency. Concomitantly, copies of the writ of certiorari must also be served upon all parties to the proceeding before the agency. See Minn. Stat. § 14.64. However, the statute does not establish a time for service upon the parties.

In reaching its decision to dismiss Plaintiff's appeal as untimely, the Minnesota Court of Appeals determined that since the time for service on other parties mandated by Minn. Stat. § 14.64 is not specified by statute, the Court must employ its rules of appellate procedure to provide the time for service. See Order of Chief Judge Edward Touissant, attached to Complaint. The Court further explained that under Minn.R.Civ.App.P. 115.03 service on other parties must be accomplished no later than thirty-three days after the decision under appeal is mailed. Id. Since the decision under appeal was mailed on August 4, 1995 and service was not accomplished until September 15, 1995, the Court of Appeals found that service was untimely. Accordingly, the appeal was dismissed for untimely service. Id.

Minnesota Courts have determined that if a writ is not timely or served, the writ must be discharged for lack of jurisdiction. See Matter of Utraflex Enterprises' Appeal, 494 N.W.2d 89, 90-91 (Minn. Ct. App. 1992), Roseville Educ. Ass'n. v. Independent School District No. 623, 391 N.W.2d 846, 849 (Minn. 1986)(issuance of a writ within the required time is a jurisdictional prerequisite to judicial review); Matter of the License Applications of Polk County Ambulance Service, 548 N.W.2d. 300 (Minn. Ct. App. 1996). Since Plaintiff's appeal was dismissed because the petition and writ were not timely served, the dismissal must be construed as being for want of jurisdiction. Therefore, the dismissal was not on the merits and, accordingly, this appeal is not barred by res judicata.[6] See Minn.R.Civ.P. 41.02(c) and Charchenko, 47 F.3d at 984-85.

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[6] The Defendants also assert that since § 1415(e)(2) of the IDEA provides dissatisfied parties the right to review in either a state court of competent Jurisdiction or in Federal district court, Plaintiff is barred from proceeding in this forum because he already chose to proceed in State Court. They argue that the statute does not contemplate resort to both State court and Federal court. The three cases cited in conjunction with this argument do not support this proposition. First, in Eberle v. Board of Public Education of the School District of Pittsburgh, PA, 444 F. Supp. 41 (1977), the Court dismissed a suit under the Education for All Handicapped Children Act ("EHCA"), now renamed IDEA, finding that it did not have jurisdiction to review the placement of the plaintiff in a special education class when the placement occurred prior to the effective date of the EHCA. The second and third cases, Coe v. Michigan Dept. of Educ., 693 F.2d 616, 617 (6th Cir. 1982) and Scruggs v. Campbell, 630 F.2d 237, 239 (4th Cir. 1980), merely stand for the proposition that an aggrieved party cannot file suits under IDEA In both state and federal courts simultaneously. That situation is not present here.

Moreover, while Plaintiff may have tried to choose a state forum, jurisdiction never vested in the Court of Appeals. Thus, Plaintiff did not actually litigate in a state forum. Accordingly this argument is unavailing.

II. Statute of Limitations.

A. IDEA.

In this case, the hearing review officer rendered her decision on August 4, 1995. Plaintiff subsequently filed the instant action on December 11, 1995. Defendants argue that Plaintiff's IDEA claims are barred on statute of limitations grounds. Although IDEA does not establish a limitations period, Defendants contend the Court should adopt the most closely analogous limitations period. This period is argued to be the thirty-day limitations period that governs judicial review of adverse state agency decisions, including appeals from adverse decisions by hearing review officers under the IDEA and Minnesota Stat. § 120.17, under the Minnesota administrative procedures act. See Minn. Stat. § 14.63. Plaintiff resists this argument by asserting that no statute of limitations should be applied, or, in the alternative, that a one-year statute of limitations be adopted.

The IDEA does not set a limitations period for lawsuits brought under its terms. "In such situations we do not ordinarily assume that Congress intended that there be no time limit on actions at all; rather, our task is to 'borrow' the most suitable statute or other rule of timeliness from some other source. We have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitation under state law, provided that it is not inconsistent with federal law or policy to do so." Amann v. Town of Stow, 991 F.2d 929, 931 (1st Cir. 1993)(citations omitted).

No Eighth Circuit Court of Appeals case has addressed the issue of the appropriate statute of limitations for IDEA cases. Moreover, the other Circuit Courts of Appeals are split. Some Courts have adopted Defendants' proposal and applied the generally short statute of limitations for judicial review of administrative decisions. See Livingston School

Dist. Nos. 4 and 1 v. Keenan, 82 F.3d 912, 916 (9th Cir. 1996)(action under the IDEA challenging an administrative hearing officer's decision is more analogous to judicial review of an administrative appeal than to an action upon a liability created by statute. Differences in the standard of review are "relatively minor" given the district court's quasi-appellate role under section 1415(e)(2). Applying a short judicial review limitations period is consistent with the IDEA's policy of prompt resolution of questions); Amann, 991 F.2d at 931-32 (Massachusetts Administrative Procedures Act contains the "most analogous" state law cause of action to the civil action authorized by § 1415(e)(2), thus thirty-day limitations period is applicable); Spiegler v. District of Columbia, 866 F.2d 461, 464-65 (D.C. Cir. 1989)(After the Supreme Court's decision in Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982) which indicated that some deference should be afforded to state administrative proceedings, suit under § 1415(e)(2) is sufficiently analogous to an appeal from an administrative decision such that a 30-day limitations period should be applied. Thirty-day period is consistent with the Act's goal of prompt resolution of disputes.); Dell v. Board of Education, Township High School District 113, 32 F.3d 1053, 1059-61 (7th Cir. 1994)(the Illinois School Code, with its 120-day limitations period, is most closely analogous to the IDEA and is also is consistent with the IDEA's policy of "prompt, rather than protracted, resolution of disputes"); and Adler by Adler v. Education Dept. of State of New York, 760 F.2d 454 (2nd Cir. 1985)(state laws process for reviewing administrative decisions involving handicapped children was most analogous to IDEA action, thus four-month period adopted. Symmetry of having same statute of limitations period for both state and federal claims also cuts in favor of 120-day period).

Conversely, other Courts have determined that longer limitations periods are more appropriate. See Scokin v. State

of Texas, 723 F.2d 432, 437-38 (5th Cir. 1984)(Thirty-day period for review of administrative decisions is inconsistent with the federal policies underlying the IDEA, court adopted a two-year period generally applicable to tort claims); and Monahan v. State of Nebraska, 491 F.Supp. 1074, 1084-85, *vac. in part on other grounds* 645 F.2d 592 (8th Cir. 1981)(differences in the standard of review between the Nebraska administrative review statute and review by the district court under IDEA require that the state administrative review statute not be adopted. Thirty-day limitations period would also run counter to policies effectuated by IDEA).

Finally, a third group of courts have taken the position that the statute of limitations should be determined on a case-by-case basis weighing the facts of each case. See Murphy v. Timberlane Regional School District, 22 F.3d 1186, 1192-93 (1st Cir. 1994)(based upon facts and procedural posture, six-year statute of limitations for personal injury suits applied); Janzen v. Knox County Board of Education, 790 F.2d 484, 489 (6th Cir. 1986)(selection of limitations period for IDEA claims must be done on a case-by-case basis; three-year period adopted).

In this case, the review contemplated by the IDEA is most analogous to review under Minnesota's Administrative Procedures Act ("APA").[7] Both the IDEA and the APA contemplate that the review will be based primarily on the record of the administrative proceedings.[8] See Livingston

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[7] No other federal statute was offered as an alternative from which to borrow a statute of limitations. Moreover, no other federal statute appears to be more analogous than the APA. Dell, 32 F.3d at 1058.

[8] 20 U.S.C. § 1415(e)(2) provides in pertinent part:

> Any party aggrieved by the findings and decision made [in the administrative proceedings] shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States

School, 82 F.3d at 916 ("administrative record is usually the principal evidence before the reviewing court" in either IDEA actions or administrative appeals"); Spiegler, 866 F.2d at 465 (district court has a "quasi-appellate role under section 1415(e)(2)"); and Minn. Stat. § 14.68 ("the review shall be confined to the record").

The fact that a district court must accept additional evidence at the request of a party does not sufficiently distinguish the IDEA action in district court from appellate review. First, as noted *supra*, the administrative record is normally the principal piece of evidence. Second, Minn. Stat. § 14.67 provides the Minnesota Court of Appeals a means of permitting the parties to submit additional evidence in a review of an administrative decision.[9] While more cumbersome and more restrictive than in federal court, the opportunity to present additional evidence, and in fact obtain further administrative review, compels a finding that appellate review

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without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the admninistrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

[9] Minn. Stat. § 14.67 provides:

If, before the date set for hearing, application is made to the court of appeals for leave to present additional evidence on the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and decision by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

of administrative decisions by the Minnesota Court of Appeals is similar to the review conducted by a Federal District Court.

Finally, while the standards of review are different, *cf.* § 1415(e)(2) (preponderance of the evidence), with Minn. Stat. § 14.69(e), (f) (unsupported by substantial evidence in view of the entire record as submitted; or arbitrary or capricious), both require the reviewing court to defer to the agency's substantive determinations. See Spiegler, 866 F.2d at 466. Consequently, a suit under § 1415(e)(2) is sufficiently analogous to an appeal from an administrative decision under Minn. Stat. §§ 14.63-.69 to permit the borrowing of the thirty-day limitations period for such appeals. See Minn. Stat. § 14.63.

As set forth in the cases *supra*, the thirty-day limitations period is consistent with the federal policies underlying the IDEA. Prompt resolution of IDEA disputes is imperative because of the harm caused to the disabled child by delay in establishing an appropriate program. In the final Senate debate on the legislation, Senator Harrison Williams of New Jersey, its principal author, stated:

> I cannot emphasize enough that delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development. The interruption or lack of the required special education and related services can result in a substantial setback to the child's development. Thus, in view of the urgent need for prompt resolution of questions involving the education of handicapped children it is expected that all hearing and review conducted pursuant to these provisions will be commenced and disposed of as quickly as practicable consistent with a fair consideration of the issues involved.

121 Cong.Rec. 37,416 (1975)(*quoted in* Spiegler, 866 F.2d at 467 and Livingston School, 82 F.3d at 916-17). Permitting parties an extended period to file their claims in federal court

will, in the end, work to the detriment of disabled students by leaving unresolved the course of their educational programs.

The thirty-day limitations period is also appealing because of the symmetry it creates with appeals to the Court of Appeals from administrative decisions under Minn. Stat. § 120.17. Under the IDEA, an aggrieved party may appeal to either federal or state court after exhausting administrative procedures. If an aggrieved party in Minnesota appeals to state court, she is permitted thirty days, from the date she received the hearing review officers decision, to file a writ of certiorari with the Minnesota Court of Appeals. Establishing the identical limitations period for resort to United States District Court will assist in the administration of justice by eliminating potential confusion for aggrieved parties. With thirty-day limitations periods in both federal and state courts, an aggrieved party will be aware that any action must be taken within thirty days.[10]

Any perceived harshness imposed by the relatively short thirty-day limitations period can be alleviated through equitable tolling in appropriate cases. Livingston School, 82 F.3d at 917, see also Anderson v. Unisys Corp., 47 F.3d 302, 306 (8th Cir. 1995). This, however, is not such a case. Plaintiff was represented by counsel from the time he filed his

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[10] The Court notes that it finds particularly unworkable the solution of some courts to determine the applicable IDEA limitations period on a case-by-case basis. This method is sure to breed satellite litigation and create unnecessary uncertainty. Although addressing the broader § 1983 action, the Supreme Court's language in Wilson v. Garcia, 471 U.S. 261, 274-275, 105 S.Ct. 1938, 1946-47 can easily be applied to the IDEA. "the legislative purpose to [assure that all children with disabilities have available to them . . . a free appropriate public education] is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters. . . . The federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach [of choosing one limitations period for each State]."

initial request for a due process hearing until the present. In addition, his counsel has previously represented that she practices substantially, if not exclusively, in school law. Plaintiff's counsel was also aware of the thirty-day period for appeal to the Minnesota Court of Appeals. In addition, other courts' "borrowing" of statutes of limitations from administrative appeal processes in IDEA cases were readily available for her review. Thus, Plaintiff's counsel could not be "surprised" that a thirty-day limitations period might be borrowed. Therefore, equitable tolling is not warranted in this case.[11]

Based upon the foregoing, Plaintiff's IDEA claims are dismissed on statute of limitations grounds. The IDEA claims were required to be filed within thirty-days of the decision by the hearing review officer. The claims were not filed for over

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[11] Plaintiff also asserts that his claim is not time barred because the statute of limitations is tolled while he is a minority. In support of his arguments he points to Minn. Stat. § 541.15(a)(1), which provides that a period of limitations is suspended when a Plaintiff is less than 18 years old.

When federal courts borrow a state statute of limitations, the court also borrows the state's rules for tolling, unless to do so would be "incompatible with the federal policy underlying the cause of action under consideration." Board of Regents v. Tomanio, 446 US. 478, 485, 100 S.Ct. 1790, 1795 (1980). In this case, borrowing Minnesota's tolling provision as it relates to those of a minority age would be completely incompatible with the federal policy of prompt resolution of IDEA disputes. See Alexopulos v. San Francisco Unified School District, 817 F.2d 551, 555 (9th Cir. 1987), *but cf.* Shook v. Gaston County Board of Education, 882 F.2d 119, 121-22 (4th Cir. 1989). Moreover, since an IDEA claim will almost always accrue to someone younger than 18, the tolling provision is inconsistent with the cause of action. Having a short limitations period leads to parties asserting their claims in a timely manner and leads to prompt resolution. Permitting parties to wait, if they choose, until they reach the age of 18 would defeat one prime purpose of IDEA. Accordingly, the tolling provision will not be borrowed.

four months after the August 4, 1995 decision. Accordingly, the IDEA claims are time-barred.[12]

B. §§ 1983, 1985, ADA, § 504, Minnesota Human Rights Act.

Defendants argue that Plaintiffs claims under 42 U.S.C. §§ 1983 and 1985; Title II of the ADA, 42 U.S.C. §§ 12131-12134; § 504 of the 1973 Rehabilitation Act; and the Minnesota Human Rights Act, are all barred by the applicable statutes of limitations. They allege that each of the claims should be deemed to have a one-year statute of limitations. Since Plaintiff moved to Bloomington in October, 1994 and

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[12] Plaintiff's IDEA claims are also subject to dismissal because he was not a student in SSD1 at the time he filed request for a due process hearing. Minn. Stat. § 120.17, subd. 1 requires that each school district provide special instruction and services "for children with a disability who are residents of the district and who are disabled. . . ." As part of its duty, a resident district must provide the parents the opportunity to obtain an impartial due process hearing when they object to a proposed assessment, placement, transfer, addition or denial of educational services. Minn. Stat. § 120.17, subd. 3b(e)(1-5).

At the time of his request for a hearing, Plaintiff was not a resident of SSD1. Thus, SSD1 was not responsible for providing Plaintiiff with special instruction and services and was not required to provide an IDEA due process hearing to Plaintiff. See Thompson v Board of the Special School District No. 1, No. 3-95-1083 (D. Minn. July 31, 1996); Byrd III v. Independent School District No. 11, 3-95-139 (D. Minn. March 23, 1995), Monahan v. State of Nebraska, 687 F.2d 1164, 1168 (8th Cir. 1982). In addition, Plaintiff's requested hearing was not for any proposed action by SSD1 and was, instead aimed at allegedly deficient services previously provided. This type of complaint is not covered by Minn. Stat. § 120.17, subd. 3b(e). Thompson, at 6. Like the Court in Thompson, this Court finds the Minnesota Court of Appeals's decision in H.M. v. Special School District No. 1 (Unpublished Slip. Op., May 14, 1996) unpersuasive. Accordingly, Plaintiff's IDEA claims must also be dismissed because Plaintiff had no right to a hearing under the IDEA or Minn. Stat. § 120.17 against SSD1.

did not file this lawsuit until December 11, 1995, they contend that Plaintiff's claims were not timely made. Plaintiff opposes Defendants' argument insisting that his efforts to exhaust his administrative requirements under the IDEA should toll any limitations period.

1. § 1983 & § 1985.

Neither § 1983 nor § 1985 provide a specific statute of limitations. Thus, like with the IDEA analysis, the courts must "borrow" a limitations period. In Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938 (1985), the Supreme Court determined that § 1983 claims are most closely analogous to claims for personal injuries. Id. at 281, 105 S.Ct. at 1949. The Court felt that "[i]t is most unlikely that the period of limitations applicable to [personal injury claims] ever was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect." Id., 105 S.Ct. at 1949. Later, the Supreme Court clarified Wilson by holding that "where state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions." Owens v. Okure, 488 U.S. 235, 250, 109 S.Ct. 573, 582 (1989).

Courts interpreting the Supreme Court's decisions have concluded that in Minnesota § 1983 claims are governed by the six-year limitations period of Minnesota's personal-injury statute, Minn. Stat. § 541.05, subd. 1(5). Egerdahl v. Hibbing Community College, 72 F.3d 615, 618 (8th Cir. 1995); Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County, Minnesota, 867 F.Supp. 1430, 1436-37 (D. Minn. 1994)("in the wake of *Owens*, . . . [t]he court agrees that the six year limitations period found in Minnesota's residual statute for personal injury actions applies to section 1983 claims").

Based upon the above, it is clear that Minnesota's residual six-year limitations period for personal injury actions applies to Plaintiff's § 1983 claims.[13] Therefore, the § 1983 claims were timely filed.

In addition, courts have found that § 1985 claims, like § 1983 actions, are governed by state statutes of limitations for personal injury actions. See Bougher v. University of Pittsburgh, 882 F.2d 74 (3rd Cir. 1989)("[b]ecause section 1985(3) violations necessarily involve a conspiracy to deprive another of rights, privileges, and immunities, the underlying deprivations sound in tort"); McDougal v. County of Imperial, 942 F.2d 668, 673 (9th Cir. 1991)(actions under § 1985 are designed to remedy the same types of harms as actions under § 1983, thus actions under § 1985 are governed by the same statute of limitations as § 1983 action); Penn v. Iowa State Board of Regents, 999 F.2d 305, 307 (8th Cir. 1993)("[t]he parties agree that the applicable statute of limitations for section 1983 and section 1985 claims is the two-year statute of limitations for personal injury"); Kaster v. State of Iowa, 975 F.2d 1381, 1382 (8th Cir. 1992)([t]he district court held, and the parties now agree, that Iowa's two-year personal injury statute of limitations applies to this action (under §§ 1983, 1985 & 1986]"); and Horton v. Marovich, 925 F.Supp. 540, 543 (N.D. Ill. 1996)("the two-year personal injury statute of limitations that applies to section 1983 also applies to section 1985(3) actions"). Thus, Plaintiff's § 1985 claim is also controlled by Minnesota's residual six-year limitations period for personal injury actions. Accordingly, it is not time barred.

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[13] Minn. Stat. § 541.05, subd. 1(5) provides that, "Except where the uniform commercial code otherwise prescribes, the following actions shall be commenced within six years: (5) For criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated."

2. ADA, § 504 and the Minnesota Human Rights Act.

Defendant SSD1 contends that these claims are governed by a one-year statute of limitations and are time barred because this lawsuit was not filed for more than one year after Plaintiff moved to Bloomington.

Plaintiff's claim under the Minnesota Human Rights Act is controlled by a one-year statute of limitation. Minn. Stat. § 363.06, subd. 3. In addition, it is at least arguable that a one-year statute of limitations should also apply to Plaintiff's ADA and § 504 claims. See McCullough v. Banch Banking & Trust Co., 35 F.3d 127, 130-32 (4th Cir. 1994)(Finding that state personal injury statute is not most analogous to § 504 Rehabilitation Act claim, but instead determining that a North Carolina statute, which was specifically designed to address employment discrimination on the basis of handicap or disability, was more analogous to § 504. Thus, 180-day limitations period of the North Carolina statute was employed.); *but see* Cheeney v. Highland Community College, 15 F.3d 79, 81 (7th Cir. 1994)(two-year statute of limitations governing personal injury suits in Illinois applies to claims brought under the Rehabilitation Act); Baker v. Board of Regents of the State of Kansas, 991 F.2d 628, 632 (10th Cir. 1993)("[b]ecause a section 504 claim is closely analogous to section 1983, we find that section 504 claims are best characterized as claims for personal injuries"); Hickey v. Irving Independent School District, 976 F.2d 980, 982-83 (5th Cir. 1992)("Of the state law claims governed by the Texas statutes of limitations, we find that personal injury claims are most nearly analogous to the discrimination claims authorized by the Rehabilitation Act."); Morse v. University of Vermont, 973 F.2d 122, 127 (2nd Cir. 1992)("we now hold that actions under § 504 of the Rehabilitation Act are governed by the state statute of limitations applicable to personal injury actions"); and *see also* Doe v. County of Milwaukee, 871

F.Supp. 1072, 1078 (E.D. Wis. 1995)("Because Title II [of the ADA], like the Rehabilitation Act, §§ 1983, 1981 and 1985, offers broad-ranging protection against a wide variety of forms [of] discrimination, the six-year limitations period [under Wisconsin law for injury to character or other rights] applies . . .").

Nevertheless, even assuming the adoption of a one-year statute of limitations, Defendant SSD1's argument is flawed for two reasons. First, while Plaintiff moved to Bloomington in the fall of 1994, his Complaint alleges that he continued to attend programs in SSD1 throughout the fall semester of the 1994-1995 school year. See Complaint, ¶ 11. Since the fall semester extended beyond December 11, 1994, his lawsuit filed on December 11, 1995 fell within the necessary one-year period required by the Minnesota Human Rights Act and arguably the ADA and § 504 of the Rehabilitation Act.

In addition, Plaintiff Smith was a minor at the time he instituted this action. Thus, Plaintiff was under a disability as defined in Minn. Stat. § 541.15(a)(1) such that the running of the statute of limitations was suspended until he reached the age of eighteen. While this tolling provision was not adopted by the Court for purposes of Plaintiff's IDEA claim because it ran counter to one of the prime underlying federal policies of the IDEA, no such impediments exist as to Plaintiff's other federal claims. Thus, the tolling provision of Minn. Stat. § 541.05 is adopted for purposes of Plaintiff's ADA and § 504 claims. See Hickey, 976 F.2d at 983-84. Accordingly, Plaintiff's claims under the ADA, § 504 of the Rehabilitation Act and the Minnesota Human Rights Act are not barred on statute of limitations grounds.

III. SSD1's Allegation of Plaintiff's Failure to State a Claim.

Plaintiff asserts claims against SSD1 based on Section 504, the ADA, section 1983 and section 1985. SSD1 alleges that Plaintiff has failed to state a claim upon which relief may be granted under any of these causes of action. Thus, SSD1 insists that these claims must be dismissed. In addition, SSD1 asserts that Plaintiff's claim under the Minnesota Human Rights Act should be dismissed for lack of supplemental jurisdiction.

A. § 504 and Title II of the ADA.

Section 504 provides in pertinent part:

> No otherwise qualified individual with a disability in the United States. . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

See 29 U.S.C. § 794(a). The Eighth Circuit Court of Appeals has determined that while the Rehabilitation Act is broader than the IDEA, because it applies to a wide-range of federally funded activities, it is also narrower than the IDEA because it does not "impose an affirmative-action obligation on all recipients of federal funds." Monahan v. State of Nebraska, 687 F.2d 1164, 1170 (8th Cir. 1982)(citation omitted). "Section 504, instead, is simply a prohibition of certain conduct on the part of recipients of federal financial

assistance." Id. Thus, in the context of education of children with disabilities, the Eighth Circuit has found that either "bad faith or gross misjudgment" should be shown before a § 504 violation can be made out. Id., see also Heidemann v. Rother, 84 F.3d 1021, 1032 (8th Cir. 1996).

Similarly, Title II of the ADA provides that, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Moreover, "[t]he remedies, procedures, and rights set forth in § 504 of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title." Courts analyzing claims under Title II of the ADA have found that the standards applicable to the Rehabilitation Act also apply to claims under Title II of the ADA because "Title II of the ADA essentially extends the anti-discrimination prohibition embodied in section 504 to all actions of State or local governments." Dertz v. City of Chicago, 912 F.Supp. 319, 325-26 n.2 (N.D. Ill. 1995); Helen L. v. DiDario, 46 F.3d 325, 331 (3rd Cir. 1995). Accordingly, for purposes of this motion, the Court will assume Plaintiff must establish either bad faith or gross misjudgment before an ADA claim under Title II can be shown. But see Peterson v. Hastings Public Schools, 31 F.3d 705, 708 (8th Cir. 1994)(where the Court affirmed the District Court's use of a burden-shifting analysis on an ADA, Title II claim).

Taking the allegations in the Complaint as true, as the Court must, SSD1's motion must be denied. Plaintiff alleges that he was "frequently dismissed, suspended or excluded from school because of his disabling condition." See Complaint, ¶ 26. If true, these actions would amount to the "denial of the benefits" of SSD1's services or programs for purposes of the Rehabilitation Act or Title II of the ADA. Moreover, it is

possible that Plaintiff can show both that these allegations are true and also the requisite elements of bad faith or gross misjudgment. This is simply not a case where the Plaintiff has included allegations that show on the face of the complaint that there is some insuperable bar to relief with respect to the § 504 and ADA claims against SSD1. City of Herculaneum, 44 F.3d at 671. Accordingly, SSD1's motion to dismiss these claims must be denied.

B. § 1983.

School districts can be liable under § 1983 if the district has an official custom or policy which causes an individual to suffer a constitutional harm. Thelma D. by Delores A. v. Board of Education of the City of St. Louis, 934 F.2d 929, 932 (8th Cir. 1991). "Official policy involves a deliberate choice to follow a course of action made from among various alternatives by an official who has the final authority to establish governmental policy." Jane Doe A. v. Special School District of St. Louis County, 901 F.2d 642, 645 (8th Cir. 1990)(citations omitted). The existence of a custom may be found in "persistent and widespread . . . practices . . . [which are] so permanent and well settled as to [have] the force of law." Thelma D., 934 F.2d at 932, *quoting* Monell v. Dep't. of Social Services, 436 U.S. 658, 690-91, 98 S.Ct. 2018, 2035-36 (1978) see also Hoekstra v. Independent School Dist. No. 283, 916 F.Supp. 941, 946-47 (D. Minn. 1996).

SSD1 argues that its motion should be granted because Plaintiff has not set forth any policy or custom of SSD1 which violates his rights. Meanwhile, Plaintiff insists that SSD1 does have a custom of denying "special education hearings to any black children who requested same on June 7, 1995 and who were not living in the district at the time of the request for hearing or if residing in the district, were not attending school in the district." See Pl.'s Mem. in Opp. at 22.

In his Complaint, Plaintiff alleged no custom or policy which caused him to suffer a harm. Moreover, it is obvious that the "custom" described by Plaintiff in his brief is so narrow as to be incapable of being a "persistent and widespread practice that is permanent and well-settled." Instead, Plaintiff is attempting to transform his alleged denial of a due process hearing into a § 1983 claim against SSD1. This event, in and of itself, is not sufficient to create liability against SSD1 under § 1983. Accordingly, SSD1's motion will be granted.

C. § 1985.

A civil conspiracy is defined as "a combination of two or more persons acting in concert to commit an unlawful act or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another and an overt act that results in damage." Rotermund v. United States Steel Corp., 474 F.2d 1139, 1145 (8th Cir. 1973). To establish a conspiracy under 42 U.S.C. § 1985(3) as alleged by Plaintiff, a plaintiff must prove:

> that the defendants did (1) conspire . . . (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws that one or more of the conspirators (3) did, or caused to be done, any act in furtherance of the object of [the] conspiracy, whereby another was (4a) injured in his person or property or (4b) deprived of having and exercising any right or privilege of a citizen of the United States.

Marquart v. Lodge 837, International Association of Machinists and Aerospace Workers, 26 F.3d 842, 853-54 (8th Cir. 1994). A plaintiff "must allege with particularity and specifically demonstrate with material facts that the defendants reached an agreement." City of Omaha Employees Betterment Ass'n. v. City of Omaha, 883 F.2d 650, 652 (8th Cir. 1989). However, a plaintiff need not demonstrate that each participant knew the "exact limits of the illegal plan . . ." and can prevail if a "jury could infer from the circumstances a 'meeting of the minds' or understanding among the conspirators to achieve the conspiracy's aims." Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979), quoted in Putman v. Gerloff, 701 F.2d 63, 65 (8th Cir. 1983).

The "purpose" element of the § 1985 conspiracy requires the plaintiff to prove a class-based "invidiously discriminatory animus." City of Omaha, 883 F.2d at 652. "[T]here must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798 (1971).

In his claims for relief, Plaintiff failed to allege that SSD1 conspired with anyone to deprive him of the equal protection of the laws. Moreover, Plaintiff, while claiming to be a disabled minor of African-American heritage, did not allege that SSD1's actions were motivated by some "racial, or . . . otherwise class-based, invidiously discriminatory animus." Id. Instead, Plaintiff merely alleged that his rights were violated under § 1985(3). Thus, Plaintiff has failed to state a claim under § 1985(3). See Senegal v Jefferson County, 785, F.Supp. 86, 89 (E.D. Tex. 1992); Lucas v. New York City 842 F.Supp. 101, 104 (S.D. N.Y. 1994).

Nevertheless, since Plaintiff did allege SSD1's involvement in a conspiracy in the facts portion of the Complaint and because his failure to allege a racial or other class-based invidiously discriminatory animus is easily curable,

the Court will accept Plaintiff's request to amend the Complaint. See Plaintiff's Mem. at 23. Thus, Plaintiff will be granted twenty days from the date of this Order to amend his Complaint to state a claim under § 1985(3).

D. Minnesota Human Rights Act.

Defendant's motion to dismiss this claim is dependent upon the dismissal of all of Plaintiff's federal claims. Since some of his federal claims will survive this motion, Defendant's motion to dismiss Plaintiff's Minnesota Human Rights Act claim will be denied.

IV. Bruce Johnson's Allegation of Plaintiff's Failure to State a Claim for Relief.

Defendant Johnson contends that the claims made by Plaintiff, even if true, would not entitle Plaintiff to relief. Thus, he seeks to have Plaintiff's Complaint dismissed.

A. § 1983.

42 U.S.C. § 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
>
> . . .

Section 1983 creates no substantive rights, but merely provides a remedy for the deprivation of existing constitutional or statutory rights. Boldthen v. Independent School District No. 2397, 865 F.Supp. 1330, 1335 (D. Minn. 1994). "To state a claim under section 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States." Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir. 1993), *quoting* West v. Atkins, 487 U.S. 42, 48, 108 S.Ct. 2250, 2255-56 (1988).

"Neither a State nor its officials acting in their official capacities are 'persons' under § 1983." Hafer v. Melo, 502 U.S. 21, 26, 112 S.Ct. 358, 362 (1991)(citations omitted). However, "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official-capacity actions for prospective relief are not treated as actions against the State." Id. (citations omitted), see also Henne v. Wright, 904 F.2d 1208, 1211 n. 2. (8th Cir. 1990)("[i]n an action for prospective relief . . . state officials sued in their official capacity are treated as "persons" under section 1983").

In this case, Plaintiff has alleged violations of the IDEA in support of his § 1983 action. While Defendant Johnson asserts that Plaintiff's claims fail to state a claim upon which relief may be granted, it is clear, that if true, Plaintiff has alleged violations of federal law. Thus, it cannot be said that Plaintiff can prove no set of facts consistent with his allegations that would entitle him to relief. Accordingly, Defendant Johnson's motion to dismiss Plaintiff's § 1983 claim must be denied.[14]

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[14] In a footnote, Defendant Johnson insists that Plaintiff § 1983 claim is precluded by the IDEA because the IDEA, is a "comprehensive and exclusive remedial scheme which precludes reliance upon a cause of action under section 1983." *Quoting*, Dept. of Educ. of the State of Hawaii v. Katherine D., 727 F.2d 809, 820 (9th Cir. 1983). It is no surprise that the cited case precedes the year 1986. For in 1986,

B. § 1995.

At this juncture, the Court is unwilling to find that Plaintiff can prove no set of facts in support of his § 1985(3) claim. Thus, for the reasons stated *supra* in section III(C), this Court will allow Plaintiff to amend his Complaint to allege that Defendant Johnson's actions were motivated by a class-based "invidiously discriminatory animus."

However, to survive summary judgment, Plaintiff will need to come forward with material facts to support his conspiracy allegations. Overextended inferences and unsupported allegations will not suffice to ward off summary dismissal.

Congress, in response to a Supreme Court decision, amended the IDEA to state specifically that the IDEA is not the exclusive avenue through which parents may enforce the rights of their handicapped children. See Digre v. Roseville Schools Independent District No. 623, 841 F.2d 245, 249 (8th Cir. 1988). Subsection 1415(f) provides:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 790 et seq.], or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

Moreover, in interpreting this provision, the Eighth Circuit Court of Appeals in Digre found that a 1983 action based on alleged violations of IDEA may be brought. Digre, 841 F.2d at 250.

It is apparent that Defendant Johnson's argument is about ten years too late.

V. Defendant Peter Hutchinson.

Defendant Peter Hutchinson moves to be dismissed from this lawsuit alleging that no claims were made against him and that he is shielded from Plaintiff's claims by qualified immunity.

In his Complaint, Plaintiff named Peter Hutchinson as a party Defendant. However, he did not allege any claims against Mr. Hutchinson. Accordingly, Defendant Hutchinson is dismissed as a party.

Conclusion

Accordingly, based upon the foregoing, and all of the files, records and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Defendant Johnson's motion to dismiss (Doc. No. 6) is **GRANTED IN PART**.[15] Plaintiff's claim against Defendant Johnson premised on the IDEA is dismissed;

2. Defendant Special School District No. 1's and Peter Hutchinson's motion to dismiss (Doc. No. 21) is **GRANTED IN PART**. Plaintiff's IDEA and § 1983 claims against SSD1 are dismissed and Defendant Hutchinson is also dismissed from this lawsuit; and

3. Plaintiff's remaining claims are as follows: Count I-- a claim under § 1985 against SSD1; Count II-- claims under the ADA, § 504, and the Minnesota Human Rights Act against SSD1; and Count III--claims under § 1983 and § 1985 against Defendant Johnson.

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[15] Matters outside the pleading were presented to the Court by Defendant Johnson. In accordance with Fed.R.Civ.P. 12(b), these matters were excluded and not reviewed by the Court. Accordingly, this motion remained a motion to dismiss under Rule 12(b)(6) and was not converted into a summary judgment motion.

s/s
ANN D. MONTGOMERY
United States District Judge

Dated: August 7, 1996

EDUCATION OF INDIVIDUALS WITH DISABILITIES

20 U.S.C. Chapter 33

SUBCHAPTER I–GENERAL PROVISIONS

Sec. 1400 Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) Findings

The Congress finds that–

(1) there are more than eight million children with disabilities in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many children with disabilities throughout the United States participating in regular school programs whose disabilities prevent them from having a successful educational experience because their disabilities are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of children with disabilities;

(8) State and local educational agencies have a responsibility to provide education for all children with disabilities, but present financial resources are inadequate to meet the special educational needs of children with disabilities; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law.

(c) Purpose

It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in Sec. 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the fights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

(Pub. L. 91-230, title VI, Sec. 601, Apr. 13, 1970, 84 Stat. 175; Pub. L. 94-142, Sec. 3(a), Nov. 29, 1975, 89 Stat. 774; Pub. L. 101-476, title IX, Sec. 901(a)(1), (b)(1)-(9), Oct. 30, 1990, 104 Stat. 1141, 1142; Pub. L 102-119, Sec. 25(b),Oct. 7, 1991, 105 Stat. 607.)

Sec. 1401 Definitions

(a) As used in this chapter–

(1)(A) The term "children with disabilities" means children–

(i) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, need special education and related services

(B) The term "children with disabilities" for children aged 3 to 5, inclusive, may, at a State's discretion, include children–

(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development; and

(ii) who, by reason thereof, need special education and related services.

(2) Repealed. Pub. L. 98-199, Sec. 2(2), Dec. 2, 1983, 97 Stat. 1357.

[(3) Repealed. Pub. L. 100-630, title 1, Sec. 101(a)(2), Nov. 7, 1988, 102 Stat. 3289.]

(4) The term "construction," except where otherwise specified, means (A) erection of new or expansion of existing structures, and the acquisition and installation of equipment therefor; or (B) acquisition of existing structures not owned by any agency or institution making application for assistance under this chapter, or (C) remodeling or alteration (including the acquisition, installation, modernization, or replacement of equipment) of existing structures; or (D) acquisition of land in

connection with activities in clauses (A), (B), and (C); or (E) a combination of any two or more of the foregoing.

(5) The term "equipment" includes machinery, utilities, and built-in equipment and any necessary enclosures or structures to house them, and includes all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture, printed, published, and audio-visual instructional materials, telecommunications, sensory, and other technological aids and devices, and books, periodicals, documents, and other related materials.

(6) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, Commonwealth of the Northern Mariana Islands, or Palau (until the Compact of Free Association with Palau takes effect pursuant to Sec. 101(a) of Public Law 99-658).

(7) The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(8) The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(9) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

(10) The term "secondary school" means a day or residential school which provides secondary education, as determined under State

composed of individuals involved in or concerned with the education and provision of services to Indian infants, toddlers, children, and youth with disabilities, including Indians with disabilities, Indian parents or guardians of such children, teachers, service providers, State and local educational officials, representatives of tribes or tribal organizations, representatives from State Interagency Coordinating Councils in States having reservations, and other members representing the various divisions and entities of the BIA. The chairperson shall be selected by the Secretary of the Interior. The advisory board shall–

(A) assist in the coordination of services within BIA and with other local, State, and Federal agencies in the provision of education for infants, toddlers, children, and youth with disabilities;

(B) advise and assist the Secretary of the Interior in the performance of the Secretary's responsibilities described in this subsection;

(C) develop and recommend policies concerning effective inter- and intra-agency collaboration, including modifications to regulations, and the elimination of barriers to inter- and intra-agency programs and activities;

(D) provide assistance and disseminate information on best practices, effective program coordination strategies, and recommendations for improved educational programming for Indian infants, toddlers, children, and youth with disabilities; and

(E) provide assistance in the preparation of information required under paragraph (3)(D).

(g)(1)(A) If the sums appropriated under subsection (h) of this section for any fiscal year are not sufficient to pay in full the total of the amounts that all States are eligible to receive

under subsection (a) of this section, each such amount shall be ratably reduced.

(B) If additional funds become available for making such payments for any fiscal year, such reduced amounts shall be increased on the same basis as such payments were reduced.

(C) Any State that receives any such additional funds shall distribute such funds in accordance with this section, except that any State that has used funds available under subsection (c)(2)(A)(ii) of this section for the purposes described in subsection (d)(2) of this section may–

(i) deduct, from the amount that the State would otherwise be required to make available to local educational agencies and intermediate educational units, the same amount of such additional funds as the State so used; and

(ii) use such funds in accordance with subsection (c)(2)(A)(ii) of this section.

(2)(A) In any fiscal year for which payments have been reduced and additional funds have not been made available under paragraph (1) to pay in full the amounts for which all States are eligible under this section, each State educational agency shall fix dates by which each local educational agency or intermediate educational unit shall report to the State agency the amount of funds available to such agency under this section that such agency estimates such agency will expend.

(B) The State educational agency shall, in accordance with this section, reallocate any funds that the State educational agency determines will not be used during the period of availability by local educational agencies and intermediate educational units, and by any such agency or unit to which such funds would be available if such agency or unit applied for such funds under this part, to those local educational agencies and intermediate educational units that the State educational agency determines will need, and be able to use, additional funds to carry out approved programs.

(h) Authorization of appropriations

For grants under subsection (a) of this section there are authorized to be appropriated such sums as may be necessary.

(Pub. L. 91-230, title VI, Sec. 611, Apr. 13, 1970, 84 Stat. 178; Pub. L. 93-380, title VI, Sec. 614(a), (e)(1), (2), Aug. 21, 1974, 88 Stat. 580, 582; Pub. L. 94-142, Secs. 2(a)(1)(3), 5(a), (c), Nov. 29, 1975, 89 Stat. 773, 776, 794; Pub. L. 95-561, title XIII, Sec. 1341(a), Nov. 1, 1978, 92 Stat. 2364; Pub. L. 96-270, Sec. 13, June 14, 1980, 94 Stat. 498; Pub. L. 98-199, Secs. 3(b), 15, Dec. 2, 1983, 97 Stat. 1358, 1374; Pub. L. 99-159, title VI, Sec. 601, Nov. 22, 1985, 99 Stat. 904; Pub. L. 99-362, Sec. 2, July 9, 1986, 100 Stat. 769; Pub. L. 99-457, title II, Sec. 201(b), title IV, Secs. 403, 404, Oct. 8, 1986, 100 Stat. 1158, 1173; Pub. L. 100-630, title 1, Sec. 102(a), Nov. 7, 1988, 102 Stat. 3290; Pub. L. 101-476, title II, Sec. 201, title IX, Sec. 901(b)(25)-(32), Oct. 30, 1990, 104 Stat. 1111, 1143; Pub. L. 102-73, title VIII, Sec. 802(d)(2), (3), July 25, 1991, 105 Stat. 361; Pub. L. 102-119, Secs. 4, 25(a)(4), (19), (b), Oct. 7, 1991, 105 Stat. 587, 606, 607; Pub. L. 103-382, title III, Sec. 311, Oct. 20, 1994, 108 Stat. 3931.)

Sec. 1412 Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

(2) The State has developed a plan pursuant to Sec. 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail

the policies and procedures which the State will undertake or has undertaken in order to assure that–

(A) there is established

(i) a goal of providing full educational opportunity to all children with disabilities,

(ii) a detailed timetable for accomplishing such a goal, and

(iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all children with disabilities between the ages of three and eighteen within the State not later than September 1, 1978, and for all children with disabilities between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to children with disabilities aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under Sec. 1417(c) of this title; and

(E) any amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days

prior to the date of submission of the amendment to the Secretary.

(3) The State has established priorities for providing a free appropriate public education to all children with disabilities, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to children with disabilities who are not receiving an education, and second with respect to children with disabilities, within each disability category, with the most severe disabilities who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each child with a disability, and such program shall be established, reviewed, and revised as provided in Sec. 1414(a)(5) of this title.

(5) The State has established

(A) procedural safeguards as required by Sec. 1415 of this title,

(B) procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and

(C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or

mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for children with disabilities within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for children with disabilities in the State educational agency and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public education to be provided children with disabilities in the State.

(7) The State shall assure that

(A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of children with disabilities, including individuals with disabilities and parents or guardians of children with disabilities, and

(B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, pro-rams, and procedures required pursuant to the provisions of this section and Sec. 1413 of this title.

(Pub. L. 91-230, title VI, Sec. 612, Apr. 13, 1970, 94 Stat. 178; Pub. L. 92-318, title IV, Sec. 421(b)(1)(C), June 23, 1972, 86 Stat. 341; Pub. L. 93-380, title VI, Secs. 614(b), (f)(1), 615(a), title VIII, Sec. 943(b), Aug. 21, 1974, 88 Stat. 581, 582, 611; Pub. L. 94142, Secs. 2(a)(4), (c), (d), 5(a), Nov. 29, 1975, 89 Stat. 773, 774, 780; Pub. L. 98-199, Sec. 3(b), Dec. 2, 1983, 97 Stat. 1358; Pub. L. 99-457, title II, Sec.

203(a),Oct. 8, 1986, 100 Stat. 1158; Pub. L. 100-630, title 1, Sec. 101 (b), Nov. 7, 1988, 102 Stat. 3291; Pub. L. 101476, title IX, Sec. 901(b)(33)-(46), (c), Oct. 30, 1990, 104 Stat. 1143-44, 1151; Pub. L. 102-119, Sec. 25(a)(5), (b), Oct. 7, 1991, 105 Stat. 606, 607.)

Sec. 1413 State plans

(a) Requisite features

Any State meeting the eligibility requirements set forth in Sec. 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall-

(1) set forth policies and procedures designed to assure that funds paid to the State under this subchapter will be expended in accordance with the provisions of this subchapter, with particular attention given to the provisions of secs. 1411 (b), 1411 (c), 1411 (d), 1412(2), and 1412(3) of this title;

(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal pro-ram under which there is specific authority for the provision of assistance for the education of children with disabilities, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all children with disabilities, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

(3) describe, consistent with the purposes of this chapter and with the comprehensive system of personnel development

described in Sec. 1476(b)(8) of this title, a comprehensive system of personnel development that shall include–

(A) a description of the procedures and activities the State will undertake to ensure an adequate supply of qualified special education and related services personnel, including–

(i) the development and maintenance of a system for determining, on an annual basis–

(I) the number and type of personnel, including leadership personnel, that are employed in the provision of special education and related services, by area of specialization, including the number of such personnel who are employed on an emergency, provisional, or other basis, who do not hold appropriate State certification or licensure; and

(II) the number and type of personnel, including leadership personnel, needed. and a projection of the numbers of such personnel that will be needed in five years, based on projections of individuals to be served, retirement and other leaving of personnel from the field, and other relevant factors;

(ii) the development and maintenance of a system for determining, on an annual basis, the institutions of higher education within the State that are preparing special education and related services personnel, including leadership personnel, by area of specialization, including–

(I) the numbers of students enrolled in such programs, and

(II) the number who graduated with certification or licensure, or with credentials to qualify for certification or licensure, during the past year; and

(iii) the development, updating, and implementation of a plan that–

(I) will address current and projected special education and related services personnel needs, including the need for leadership personnel; and

(II) coordinates and facilitates efforts among State and local educational agencies, institutions of higher education,

and professional associations to recruit, prepare, and retain qualified personnel, including personnel from minority backgrounds, and personnel with disabilities; and

(B) a description of the procedures and activities the State will undertake to ensure that all personnel necessary to carry out this subchapter are appropriately and adequately prepared, including

(i) a system for the continuing education of regular and special education and related services personnel;

(ii) procedures for acquiring and disseminating to teachers, administrators, and related services personnel significant knowledge derived from education research and other sources; and

(iii) procedures for adopting, where appropriate, promising practices, materials, and technology.

(4) set forth policies and procedures to assure–

(A) that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; and

(B) that–

(i) children with disabilities in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring provision of

as are not adequately providing special education and related services to all children with disabilities residing in the areas served by such other local educational agencies.

(f) Programs using State or local funds

Notwithstanding the provisions of subsection (a)(2)(B)(ii) of this section, any local educational agency which is required to carry out any pro-ram for the education of children with disabilities pursuant to a State law shall be entitled to receive payments under Sec. 1411 (d) of this title for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

(Pub. L. 91-230, title VI, Sec. 614, Apr. 13, 1970, 84 Stat. 181; Pub. L. 94-142, Sec. 5(a), Nov. 29, 1975, 89 Stat. 794; Pub. L. 98-199, Sec. 3(b), Dec. 2, 1983, 97 Stat. 1358; Pub. L. 100-630, title 1, Sec. 102(d), Nov. 7, 1988, 102 Stat. 3293; Pub. L. 101-476, title IX, Sec. 901(b)(59)-(70), Oct. 30, 1990, 104 Stat. 1144; Pub. L. 102-119, Secs. 6, 25(b), Oct. 7, 1991, 105 Stat. 591, 607.)

Sec. 1414a Treatment of chapter 1 State agencies

(a) For the purpose of making payments under Secs. 1411 and 1419 of this title, any State agency that received funds for fiscal year 1994 under subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2791 et seq.] (as such subpart was in existence on the

day preceding October 20, 1994 shall be treated as if the State agency were a local educational agency.

(b) Any State agency which desires to receive payments under Sec. 1411 (d) of this title and Sec. 1419(c)(3) of this title for any fiscal year shall submit an application to the State educational agency. Such application shall-

(1) include an assurance that all children with disabilities who are participating in programs and projects funded under this part receive a free appropriate public education, and that such children and their parents are provided all the rights and procedural safeguards described in this subchapter; and

(2) meet those requirements of Sec. 1414 of this title that the Secretary finds appropriate.

(c) Sec. 1411 (c)(4) of this title shall not apply with respect to a State agency that is eligible for a payment under this part by application of this section.

(Pub. L. 91-230, title VI, Sec. 614a, as added Pub. L. 103-382, title III, Sec. 312, Oct. 20, 1994, 108 Stat. 3935.)

Sec. 1415 Procedural safeguards

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to–

(A) an opportunity for the parents or guardian of a child with a disability to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee Of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit–

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational

agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded–

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities,

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of such hearing, and

(4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public) consistent with the requirements of Sec. 1417(c) of this title and shall also be transmitted to the advisory panel established pursuant to Sec. 1414(a)(12) of this title.

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3)(A) Except as provided in subparagraph (B), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(B)(i) Except as provided in clause (iii), if the proceedings conducted pursuant to this section involve a child with a disability who is determined to have brought a weapon to school under the jurisdiction of such agency, then the child may be placed in an interim alternative educational setting, in accordance with State law, for not more than 45 days.

(ii) The interim alternative educational setting described in clause (i) shall be decided by the individuals described in sec. 1401(a)(20) of this title.

(iii) If a parent or guardian of a child described in clause (i) requests due process hearing pursuant to paragraph (2) of subsection (b), then the child shall remain in the alternative

educational setting described in such clause during the pendency of any proceedings conducted pursuant to this section, unless the parents and the local educational agency agree otherwise.

(iv) For the purpose of this section, the term "weapon" means a firearm as such term is defined in Sec. 921 of title 18, United States Code.

(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if–

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a

parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that–

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding, the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(f) Effect on other laws

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

(Pub. L. 91-230, title VI, Sec. 615, as added Pub. L. 94-142, Sec. 5(a), Nov. 29, 1975, 89 Stat. 788 and amended Pub. L. 99-372, Secs. 2, 3, Aug. 5, 1986, 100 Stat. 796, 797; Pub. L. 100-630, title I, Sec. 102(e), Nov. 7, 1988, 102 Stat. 3294;

Pub. L 101-476, title IX, Sec. 901(b)(71)-(75), Oct. 30, 1990, 104 Stat. 1145; Pub. L. 102-119, Sec. 25(b), Oct. 7, 1991, 105 Stat. 607; Pub. 103-382, title III, Sec. 314(a)(1), Oct. 20, 1994, 108 Stat. 3936.)

Sec. 1416 Withholding of payments

(a) Failure to comply with this subchapter; limitations; public notice

Whenever the Secretary, after reasonable notice and opportunity for hearing to the State educational agency involved (and to any local educational agency or intermediate educational unit affected by any failure described in clause (2)), finds–

(1) that there has been a failure to comply substantially with any provision of Sec. 1412 or Sec. 1413 of this title, or

(2) that in the administration of the State plan there is a failure to comply with any provision of this subchapter or with any requirements set forth in the application of a local educational agency or intermediate educational unit approved by the State educational agency pursuant to the State plan, the Secretary–

(A) shall, after notifying the State educational agency, withhold any further payments to the State under this subchapter, and

(B) may, after notifying the State educational agency, withhold further payments to the State under the Federal programs specified in Sec. 1413(a)(2) of this title within the Secretary's jurisdiction, to the extent that funds under such programs are available for the provision of assistance for the education of children with disabilities.

If the Secretary withholds further payments under clause (A) or clause (B) the Secretary may determine that such withholding will be limited to programs or projects under the State plan, or portions thereof, affected by the failure, or that

the State educational agency shall not make further payments under this part to specified local educational agencies or intermediate educational units affected by the failure. Until the Secretary is satisfied that there is no longer any failure to comply with the provisions of this subchapter, as specified in clause (1) or clause (2), no further payments shall be made to the State under this subchapter or under the Federal programs specified in Sec. 1413(a)(2) of this title within the Secretary's jurisdiction to the extent that funds under such programs are available for the provision of assistance for the education of children with disabilities, or payments by the State educational agency under this subchapter shall be limited to local educational agencies and intermediate educational units whose actions did not cause or were not involved in the failure, as the case may be. Any State educational agency, local educational agency, or intermediate educational unit in receipt of a notice pursuant to the first sentence of this subsection shall, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to

(e) The designee arranges for the preparation, retention, and, if appropriate, dissemination of the record of the hearing.

(Authority: 20 U.S.C. 1413(d)(3)(A))

Sec. 300.485 Decision

(a) The designee who conducts the show cause hearing–

(1) Issues a written decision that includes a statement of findings; and

(2) Submits a copy of the decision to the Secretary and sends a copy to each party by certified mail with return receipt requested.

(b) Each party may submit comments and recommendations on the designee's decision to the Secretary within 15 days of the date the party receives the designee's decision.

(c) The Secretary adopts, reverses, or modifies the designee's decision and notifies the SEA of the Secretary's final action. That notice is sent by certified mail with return receipt requested.

(Authority: 20 U.S.C. 1413(d)(3)(A))

Sec. 300.486 Filing requirements

(a) Any written submission under 300.482-300.485 must be filed by hand-delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(b) The filing date under paragraph (a) of this section is the date the document is–

(1) Hand-delivered;

(2) Mailed; or

(3) Sent by facsimile transmission,

(c) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department,

(d) If a document is filed by facsimile transmission, the Secretary or the hearing officer, as applicable, may require the filing of a followup hard copy by hand-delivery or by mail within a reasonable period of time.

(e) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(Authority: 20 U.S.C. 1413(d)(3)(A))

Sec. 300.487 Judicial review

If dissatisfied with the Secretary's final action, the SEA may, within 60 days after notice of that action, file a petition for review with the United States court of appeals for the circuit in which the State is located. The procedures for judicial review are described in section 613(d)(3)(B)-(D) of the Act.

(Authority: 20 U.S.C. 1413(d)(3)(B)-(D))

SUBPART E–PROCEDURAL SAFEGUARDS

Due Process Procedures for Parents and Children

Sec.300.500 Definitions of "consent," "evaluation," and "personally identifiable"

(a) As used in this part: "Consent" means that–

(1) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;

(2) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and

(3) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

(b) "Evaluation" means procedures used in accordance with Secs. 300.530-300.534 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class.

(c) "Personally identifiable" means that information includes–

(1) The name of the child, the child's parent or other family member;

(2) The address of the child,

(3) A personal identifier, such as the child's social security number or student number; or

(4) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

(Authority: 20 U.S.C. 1415, 1417(c))

Sec. 300.501 General responsibility of public agencies

Each SEA shall ensure that each public agency establishes and implements procedural safeguards that meet the requirements of Secs 300.500-300.515.

(Authority: 20 U.S.C. 1415(a))

Sec. 300.502 Opportunity to examine records

The parents of a child with a disability shall be afforded, in accordance with the procedures of Secs. 300.562-300.569, an opportunity to inspect and review all education records with respect to–

(a) The identification, evaluation, and educational placement of the child; and

(b) The provision of FAPE to the child.

(Authority: 20 U.S.C. 1415(b)(1)(A))

Sec. 300.503 Independent educational evaluation

(a) General

(1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

(3) For the purposes of this part:

(i) "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.

(ii) "Public expense" means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with Sec. 300.301.

(b) Parent right to evaluation at public expense

A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However, the public agency may initiate a hearing under Sec. 300.506 to show that its evaluation is appropriate.

If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(c) Parent initiated evaluations

If the parent obtains an independent educational evaluation at private expense, the results of the evaluation–

(1) Must be considered by the public agency in any decision made with respect to the provision of FAPE to the child; and

(2) May be presented as evidence at a hearing under this subpart regarding that child.

(d) Requests for evaluations by hearing officers

If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(e) Agency criteria

Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the public agency uses when it initiates an evaluation.

(Authority: 20 U.S.C. 141 5(b)(1)(A))

Sec. 300.504 Prior notice; parent consent

(a) Notice

Written notice that meets the requirements of Sec. 300.505 must be given to the parents of a child with a disability a reasonable time before the public agency–

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

(b) Consent: procedures if a parent refuses consent

(1) Parental consent must be obtained before–

(i) Conducting a preplacement evaluation; and

(ii) Initial placement of a child with a disability in a program providing special education and related services.

(2) If State law requires parental consent before a child with a disability is evaluated or initially provided special education and related services. State procedures govern the public agency in overriding a parent's refusal to consent.

(3) If there is no State law requiring consent before a child with a disability is evaluated or initially provided special education and related services. the public agency may use the hearing procedures in Secs. 300.506-300.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent. If it does so and the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under Secs. 300.510-300.513.

(c) Additional State consent requirements

In addition to the parental consent requirements described in paragraph (b) of this section, a State may require parental consent for other services and activities under this part if it ensures that each public agency in the State establishes and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE.

(d) Limitation

A public agency may not require parental consent as a condition of any benefit to the parent or the child except for the service or activity for which consent is required under paragraphs (b) or (c) of this section.

(Authority: 20 U.S.C. 1415(b)(1)(C), (D); 1412(2), (6))

Note 1: Any changes in a child's special education program after the initial placement am not subject to the parental consent requirements in paragraph (b)(1) of this section. but arc subject to the prior notice requirement in paragraph (a) of this section and the IEP requirements of Secs. 300.340-300.350.

Note 2: Paragraph (b)(2) of this section means that if State law requires parental consent before evaluation or before special education no related services are initially provided, and the parent refuses (or otherwise withholds) consent. State procedures, such as obtaining a court order authorizing the public agency to conduct the evaluation or provide the education and related services, must be followed.

If, however, there is no legal requirement for consent outside of these regulations, the public agency may use the due process procedures of Secs. 300.506-300.508 to obtain a decision to allow the evaluation or services without parental consent. The agency must notify the parent of its actions, and the parent has appeal rights as well as rights at the hearing itself.

Note 3: If a State adopts a consent requirement in addition to those described in paragraph (b) of this section and consent is refused, paragraph (d) of this section requires that the public agency must nevertheless provide the services and activities that are not in dispute. For example, if a State requires parental consent to the provision of all services identified in an IEP and the parent refuses to consent to physical therapy

services included in the IEP, the agency is not relieved of its obligation to implement those portions of the IEP to which the parent consents.

If the parent refuses to consent and the public agency determines that the service or activity in dispute is necessary to provide FAPE to the child, paragraph (c) of this section requires that the agency must implement its procedures to override the refusal.

This section does not preclude the agency from reconsidering its proposal if it believes that circumstances warrant.

Sec. 300.505 Content of notice

(a) The notice under Sec. 300.504 must include–

(1) A full explanation of all of the procedural safeguards available to the parents under Sec. 300.500, Secs. 300.502-300.515, and Secs. 300.562-300.569;

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and (4) A description of any other factors that are relevant to the agency's proposal or refusal.

(b) The notice must be–

(1) Written in language understandable to the general public, and

(2) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(c) If the native language or other mode of communication of the parent is not a written language, the SEA or LEA shall take steps to ensure–

(1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(2) That the parent understands the content of the notice; and

(3) That there is written evidence that the requirements in paragraphs (c)(1) and (2) of this section have been met.

(Approved by the Office of Management and Budget under control number 1820-0030.)

(Authority: 20 U.S.C. 1415(b)(1)(D))

Sec. 300.506 Impartial due process hearing

(a) A parent or a public educational agency may initiate a hearing on any of the matters described in Sec. 300.504(a)(1) and (2).

(b) The hearing must be conducted by the SEA or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the SEA.

(c) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if–

(1) The parent requests the information; or

(2) The parent or the agency initiates a hearing under this section.

(Authority: 20 U.S.C. 1415(b)(2))

Note: Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes concerning the

identification, evaluation, and educational placement of children with disabilities, and the provision of FAPE to those children. Mediations have been conducted by members of SEAs or LEA personnel who were not previously involved in the particular case. In many cases, mediation leads to resolution of differences between parents and agencies without the development of in adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent's rights under Secs. 300.500-300.515.

Sec. 300-507 Impartial hearing officer

(a) A hearing may not be conducted–

(1) By a person who is an employee of a public agency that is involved in the education or care of the child; or

(2) By any person having a personal or professional interest that would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(c) Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons. (Authority: 20 U.S.C. 1414(b)(2))

Sec. 300.508 Hearing rights

(a) Any party to a hearing has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities.

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses.

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing.

(4) Obtain a written or electronic verbatim record of the hearing.

(5) Obtain written findings of fact and decisions. The public agency, after deleting any personally identifiable information, shall–

(i) Transmit those findings and decisions to the State advisory panel established under Sec. 300.650; and

(ii) Make those findings and decisions available to the public.

[Next page should be 34.300-25.]

120.11 SCHOOL BOARDS AND TEACHERS, DUTIES.

It shall be the duty of each board through its clerk or other authorized agent or employee, to report the names of children required to attend school, with excuses, if any, granted in such district, to the superintendent or principals thereof, within the first week of school. Subsequent excuses granted shall be forthwith reported in the same manner. The clerk or principal shall provide the teachers in the several schools supervised, with the necessary information for the respective grades of school, relating to the list of pupils with excuses granted. On receipt of the list of such pupils of school age and the excuses granted, the clerk or principals shall report the names of children not excused, who are not attending school, with the names and addresses of their parents, to the district superintendent within five days after receiving the report.

History: *Ex1959 c 71 art 1 s 11; 1975 c 162 s 4; 1Sp1985 c 12 art 7 s 4, 1986 c 444*

120.12 MS 1957 [Repealed, Ex1959 c 71 art 8 s 26]
120.12 MS 1986 [Repealed, 1987 c 178 s 10]
120.13 MS 1957 [Repealed, Ex1959 c 71 art 8 s 26]
120.13 MS 1988 [Repealed, 1989 c 329 art 9 s 34]
120.14 MS 1957 [Repealed, Ex1959 c 71 art 8 s 26]

120.14 ATTENDANCE OFFICERS.

The board of any district may authorize the employment of attendance officers, who shall investigate truancy or nonattendance at school, make complaints, serve notice and

process, and attend to the enforcement of all laws and district rules regarding school attendance. When any attendance officer learns of any case of habitual truancy or continued nonattendance of any child required to attend school the officer shall immediately notify the person having control of such child to forthwith send to and keep the child in school. The officer shall act under the general supervision of the district superintendent.

History: *Ex1959 c 71 art 1 s 14; 1978 c 616 s 3; 1986 c 444*

120.15 MS 1957 [Repealed, Ex1959 c 71 art 8 s 26]
120.15 MS 1988 [Repealed, 1989 c 329 art 9 s 34]
120.16 MS 1957 [Repealed, Ex1959 c 71 art 8 s 26]
120.16 MS 1988 [Repealed, 1989 c 329 art 9 s 34]

SPECIAL EDUCATION

120.17 MS 1957 [Repealed, Ex1959 c 71 art 8 s 26]

120.17 CHILDREN WITH A DISABILITY.

Subdivision 1. **Special instruction for children with a disability.** Every district shall provide special instruction and services, either within the district or in another district, for children with a disability who are residents of the district and who are disabled as set forth in section 120.03. Notwithstanding any age limits in laws to the contrary, special instruction and services must be provided from birth until September 1 after the child with a disability becomes 22 years old but shall not extend beyond secondary school or its equivalent, except as provided in section 126.22, subdivision 2. Local health, education, and social service agencies shall refer children under age five who are known to need or

suspected of needing special instruction and services to the school district. Districts with less than the minimum number of eligible children with a disability as determined by the state board shall cooperate with other districts to maintain a full range of programs for education and services for children with a disability. This subdivision does not alter the compulsory attendance requirements of section 120.101.

Subd. 1a. [Repealed, 1Spl985 c 12 art 3 s 30]

Subd. 1b. **High school diploma.** Upon completion of secondary school or the equivalent, a pupil with a disability who satisfactorily attains the objectives in the pupil's individual education plan shall be granted a high school diploma that is identical to the diploma granted to a pupil without a disability.

Subd. 2. **Method of special instruction.** (a) Special instruction and services for children with a disability must be based on the assessment and individual education plan. The instruction and services may be provided by one or more of the following methods:

(1) in connection with attending regular elementary and secondary school classes;

(2) establishment of special classes;

(3) at the home or bedside of the child;

(4) in other districts;

(5) instruction and services by special education cooperative centers established under this section, or in another member district of the cooperative center to which the resident district of the child with a disability belongs;

(6) in a state residential school or a school department of a state institution approved by the commissioner;

(7) in other states;

(8) by contracting with public, private or voluntary agencies;

(9) for children under age five and their families, programs and services established through collaborative efforts with other agencies;

(10) for children under age five and their families, programs in which children with a disability are served with children without a disability; and

(11) any other method approved by the commissioner.

(b) Preference shall be given to providing special instruction and services to children under age three and their families in the residence of the child with the parent or primary caregiver, or both, present.

(c) The primary responsibility for the education of a child with a disability shall remain with the district of the child's residence regardless of which method of providing special instruction and services is used. If a district other than a child's district of residence provides special instruction and services to the child, then the district providing the special instruction and services shall notify the child's district of residence before the child's individual education plan is developed and shall provide the district of residence an opportunity to participate in the plan's development. The district of residence must inform the parents of the child about the methods of instruction that are available.

(d) Paragraphs (e) to (i) may be cited as the "blind persons' literacy rights and education act."

(e) The following definitions apply to paragraphs (f) to (i).

"Blind student" means an individual who is eligible for special educational services and who:

(1) has a visual acuity of 20/200 or less in the better eye with correcting lenses or has a limited field of vision such that the widest diameter subtends an angular distance of no greater than 20 degrees; or

(2) has a medically indicated expectation of visual deterioration.

"Braille" means the system of reading and writing through touch commonly known as standard English Braille.

"Individualized education plan" means a written statement developed for a student eligible for special education and services pursuant to this section and section 602(a)(20) of part A of the Individuals with Disabilities Education Act, United States Code, title 20, section 1401 (a).

(f) In developing an individualized education plan for each blind student the presumption must be that proficiency in Braille reading and writing is essential for the student to achieve satisfactory educational progress. The assessment required for each student must include a Braille skills inventory, including a statement of strengths and deficits. Braille instruction and use are not required by this paragraph if, in the course of developing the student's individualized education program, team members concur that the student's visual impairment does not affect reading and writing performance commensurate with ability. This paragraph does not require the exclusive use of Braille if other special education services are appropriate to the student's educational needs. The provision of other appropriate services does not preclude Braille use or instruction. Instruction in Braille reading and writing shall be available for each blind student for whom the multidisciplinary team has determined that reading and writing is appropriate.

(g) Instruction in Braille reading and writing must be sufficient to enable each blind student to communicate effectively and efficiently with the same level of proficiency expected of the student's peers of comparable ability and grade level.

(h) The student's individualized education plan must specify:

(1) the results obtained from the assessment required under paragraph (f);

(2) how Braille will be implemented through integration with other classroom activities;

(3) the date on which Braille instruction will begin;

(4) the length of the period of instruction and the frequency and duration of each instructional session;

(5) the level of competency in Braille reading and writing to be achieved by the end of the period and the objective assessment measures to be used; and

(6) if a decision has been made under paragraph (f) that Braille instruction or use is not required for the student:

(i) a statement that the decision was reached after a review of pertinent literature describing the educational benefits of Braille instruction and use; and

(ii) a specification of the evidence used to determine that the student's ability to read and write effectively without Braille is not impaired.

(i) Instruction in Braille reading and writing is a service for the purpose of special education and services under this section.

(j) Paragraphs (e) to (i) shall not be construed to supersede any rights of a parent or guardian of a child with a disability under federal or state law.

Subd. 3. **Rules of the state board.** (a) The state board shall promulgate rules relative to qualifications of essential personnel, courses of study, methods of instruction, pupil eligibility, size of classes, rooms, equipment, supervision, parent consultation, and any other rules it deems necessary for instruction of children with a disability. These rules shall provide standards and procedures appropriate for the implementation of and within the limitations of subdivisions 3a and 3b. These rules shall also provide standards for the discipline, control, management and protection of children with a disability. The state board shall not adopt rules for pupils served in level 1, 2, or 3, as defined in Minnesota Rules, part 3525.2340, establishing either case loads or the maximum number of pupils that may be assigned to special education teachers. The state board, in consultation with the departments of health and human services, shall adopt

permanent rules for instruction and services for children under age five and their families. These rules are binding on state and local education, health, and human services agencies. The state board shall adopt rules to determine eligibility for special education services. The rules shall include procedures and standards by which to grant variances for experimental eligibility criteria. The state board shall, according to section 14.05, subdivision 4, notify a district applying for a variance from the rules within 45 calendar days of receiving the request whether the request for the variance has been granted or denied. If a request is denied, the board shall specify the program standards used to evaluate the request and the reasons for denying the request.

(b) The state's regulatory scheme should support schools by assuring that all state special education rules adopted by the state board of education result in one or more of the following outcomes:

(1) increased time available to teachers for educating students through direct and indirect instruction;

(2) consistent and uniform access to effective education programs for students with disabilities throughout the state;

(3) reduced inequalities, conflict, and court actions related to the delivery of special education instruction and services for students with disabilities;

(4) clear expectations for service providers and for students with disabilities;

(5) increased accountability for all individuals and agencies that provide instruction and other services to students with disabilities;

(6) greater focus for the state and local resources dedicated to educating students with disabilities; and

(7) clearer standards for evaluating the effectiveness of education and support services for students with disabilities.

Subd. 3a. **School district obligations.** Every district shall ensure that:

(1) all students with disabilities are provided the special instruction and services which are appropriate to their needs. The student's needs and the special education instruction and services to be provided shall be agreed upon through the development of an individual education plan. The plan shall address the student's need to develop skills to live and work as independently as possible within the community. By grade 9 or age 14, the plan shall address the student's needs for transition from secondary services to post-secondary education and training, employment, community participation, recreation, and leisure and home living. The plan must include a statement of the needed transition services, including a statement of the interagency responsibilities or linkages or both before secondary services are concluded;

(2) children with a disability under age five and their families are provided special instruction and services appropriate to the child's level of functioning and needs;

(3) children with a disability and their parents or guardians are guaranteed procedural safeguards and the right to participate in decisions involving identification, assessment and educational placement of children with a disability;

(4) to the maximum extent appropriate, children with a disability, including those in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with a disability from the regular educational environment occurs only when and to the extent that the nature or severity of the disability is such that education in regular classes with the use of supplementary services cannot be achieved satisfactorily;

(5) in accordance with recognized professional standards, testing and evaluation materials, and procedures utilized for the purposes of classification and placement of children with a

disability are selected and administered so as not to be racially or culturally discriminatory; and

(6) the rights of the child are protected when the parents or guardians are not known or not available, or the child is a ward of the state.

Subd. 3b. **Procedures for decisions.** Every district shall utilize at least the following procedures for decisions involving identification, assessment, and educational placement of children with a disability:

(a) Parents and guardians shall receive prior written notice of:

(1) any proposed formal educational assessment or proposed denial of a formal educational assessment of their child;

(2) a proposed placement of their child in, transfer from or to, or denial of placement in a special education program; or

(3) the proposed provision, addition, denial or removal of special education services for their child;

(b) The district shall not proceed with the initial formal assessment of a child, the initial placement of a child in a special education program, or the initial provision of special education services for a child without the prior written consent of the child's parent or guardian. The refusal of a parent or guardian to consent may be overridden by the decision in a hearing held pursuant to clause (e) at the district's initiative;

(c) Parents and guardians shall have an opportunity to meet with appropriate district staff in at least one conciliation conference if they object to any proposal of which they are notified pursuant to clause (a). The conciliation process shall not be used to deny or delay a parent or guardian's right to a due process hearing. If the parent or guardian refuses efforts by the district to conciliate the dispute with the school district, the requirement of an opportunity for conciliation shall be deemed to be satisfied;

(d) The commissioner shall establish a mediation process to assist parents, school districts, or other parties to resolve disputes arising out of the identification, assessment, or educational placement of children with a disability. The mediation process must be offered as an informal alternative to the due process hearing provided under clause (e), but must not be used to deny or postpone the opportunity of a parent or guardian to obtain a due process hearing.

(e) Parents, guardians, and the district shall have an opportunity to obtain an impartial due process hearing initiated and conducted by and in the school district responsible for assuring that an appropriate program is provided in accordance with state board rules, if the parent or guardian continues to object to:

(1) a proposed formal educational assessment or proposed denial of a formal educational assessment of their child;

(2) the proposed placement of their child in, or transfer of their child to a special education program;

(3) the proposed denial of placement of their child in a special education program or the transfer of their child from a special education program;

(4) the proposed provision or addition of special education services for their child; or

(5) the proposed denial or removal of special education services for their child.

At least five calendar days before the hearing, the objecting party shall provide the other party with a brief written statement of the objection and the reasons for the objection.

The hearing shall take place before an impartial hearing officer mutually agreed to by the school board and the parent or guardian. If the school board and the parent or guardian are unable to agree on a hearing officer, the school board shall request the commissioner to appoint a hearing officer. The

hearing officer shall not be a school board member or employee of the school district where the child resides or of the child's school district of residence, an employee of any other public agency involved in the education or care of the child, or any person with a personal or professional interest which would conflict with the person's objectivity at the hearing. A person who otherwise qualifies as a hearing officer is not an employee of the district solely because the person is paid by the district to serve as a hearing officer. If the hearing officer requests an independent educational assessment of a child, the cost of the assessment shall be at district expense. The proceedings shall be recorded and preserved, at the expense of the school district, pending ultimate disposition of the action.

(f) The decision of the hearing officer pursuant to clause (e) shall be rendered not more than 45 calendar days from the date of the receipt of the request for the hearing. A hearing officer may grant specific extensions of time beyond the 45-day period at the request of either party. The decision of the hearing officer shall be binding on all parties unless appealed to the hearing review officer by the parent, guardian, or the school board of the district where the child resides pursuant to clause (g).

The local decision shall:

(1) be in writing;

(2) state the controlling facts upon which the decision is made in sufficient detail to apprise the parties and the hearing review officer of the basis and reason for the decision;

(3) state whether the special education program or special education services appropriate to the child's needs can be reasonably provided within the resources available to the responsible district or districts;

(4) state the amount and source of any additional district expenditure necessary to implement the decision; and

(5) be based on the standards set forth in subdivision 3a and the rules of the state board.

(g) Any local decision issued pursuant to clauses (e) and (f) may be appealed to the hearing review officer within 30 calendar days of receipt of that written decision, by the parent, guardian, or the school board of the district responsible for assuring that an appropriate program is provided in accordance with state board rules.

If the decision is appealed, a written transcript of the hearing shall be made by the school district and shall be accessible to the parties involved within five calendar days of the filing of the appeal. The hearing review officer shall issue a final independent decision based on an impartial review of the local decision and the entire record within 30 calendar days after the filing of the appeal. The hearing review officer shall seek additional evidence if necessary and may afford the parties an opportunity for written or oral argument; provided any hearing held to seek additional evidence shall be an impartial due process hearing but shall be deemed not to be a contested case hearing for purposes of chapter 14. The hearing review officer may grant specific extensions of time beyond the 30-day period at the request of any party.

The final decision shall:

(1) be in writing;

(2) include findings and conclusions; and

(3) be based upon the standards set forth in subdivision 3a and in the rules of the state board.

(h) The decision of the hearing review officer shall be final unless appealed by the parent or guardian or school board to the court of appeals. The judicial review shall be in accordance with chapter 14.

(i) The commissioner of education shall select an individual who has the qualifications enumerated in this paragraph to serve as the hearing review officer:

(1) the individual must be knowledgeable and impartial;

(2) the individual must not have a personal interest in or specific involvement with the student who is a party to the hearing;

(3) the individual must not have been employed as an administrator by the district that is a party to the hearing;

(4) the individual must not have been involved in the selection of the administrators of the district that is a party to the hearing;

(5) the individual must not have a personal, economic, or professional interest in the outcome of the hearing other than the proper administration of the federal and state laws, rules, and policies;

(6) the individual must not have substantial involvement in the development of a state or local policy or procedures that are challenged in the appeal; and

(7) the individual is not a current employee or board member of a Minnesota public school district, education district, intermediate unit or regional education agency, the state department of education, the state board of education, or a parent advocacy organization or group.

(j) In all appeals, the parent or guardian of the pupil with a disability or the district that is a party to the hearing may challenge the impartiality or competence of the proposed hearing review officer by applying to the state board of education.

(k) Pending the completion of proceedings pursuant to this subdivision, unless the district and the parent or guardian of the child agree otherwise, the child shall remain in the child's current educational placement and shall not be denied initial admission to school.

(l) The child's school district of residence, a resident district, and providing district shall receive notice of and may be a party to any hearings or appeals under this subdivision.

Subd. 3c. [Repealed, 1981 c 358 art 3 s 20]

Subd. 4. **Special instructions for nonresident children.** When a school district provides instruction and services outside the district of residence, board and lodging, and any tuition to be paid, shall be paid by the district of residence. The tuition rate to be charged for any child with a disability shall be the actual cost of providing special instruction and services to the child including a proportionate amount for capital outlay and debt service but not including any amount for transportation, minus the amount of special aid for children with a disability received on behalf of that child. If the boards involved do not agree upon the tuition rate, either board may apply to the commissioner to fix the rate. The commissioner shall then set a date for a hearing, giving each board at least ten days' notice, and after the hearing the commissioner shall make an order fixing the tuition rate, which shall be binding on both school districts.

When a district provides instruction and services in a day program outside the district of residence, the district of residence shall be responsible for providing transportation. When a district provides instruction and services requiring board and lodging or placement in a residential program outside the district of residence, the nonresident district in which the child is placed shall be responsible for providing transportation. Transportation costs shall be paid by the district responsible for providing transportation and the state shall pay transportation aid to that district.

For the purposes of this section, any school district may enter into an agreement, upon terms and conditions which are mutually agreed upon, to provide special instruction and services for children with a disability. In that event, one of the participating units may employ and contract with necessary qualified personnel to offer services in the several districts. Each participating unit shall reimburse the employing unit a proportionate amount of the actual cost of providing the special instruction and services, less the amount of state

special education aid, which shall be claimed in full by the employing district.

Subd. 4a. **Attendance in another district.** No resident of a district who is eligible for special instruction and services pursuant to this section shall be denied provision of this instruction and service because of attending a public school in another school district pursuant to section 123.39, subdivision 5, if the attendance is not subject to section 120.075, 120.0751, or 120.0752. If the pupil attends a public school located in a contiguous district and the district of attendance does not provide special instruction and services, the district of residence shall provide necessary transportation for the pupil between the boundary of the district of residence and the educational facility where special instruction and services are provided within the district of residence. The district of residence may provide necessary transportation for the pupil between its boundary and the school attended in the contiguous district, but shall not pay the cost of transportation provided outside the boundary of the district of residence.

Subd. 5. **School of parents' choice.** Nothing in this chapter shall be construed as preventing parents of a child with a disability from sending such child to a school of their choice, if they so elect, subject to admission standards and policies adopted according to chapter 128A, and all other provisions of chapters 120 to 129.

Subd. 5a. **Summer programs.** A district may provide summer programs for children with a disability living within the district and nonresident children temporarily placed in the district pursuant to subdivision 6 or 7. Prior to March 31 or 30 days after the child with a disability is placed in the district, whichever is later, the providing district shall give notice to the district of residence of any nonresident children temporarily placed in the district pursuant to subdivision 6 or 7, of its intention to provide these programs. Notwithstanding any contrary provisions in subdivisions 6 and 7, the school district

providing the special instruction and services shall apply for special education aid for the summer program. The unreimbursed actual cost of providing the program for nonresident children with a disability, including the cost of board and lodging, may be billed to the district of the child's residence and shall be paid by the resident district. Transportation costs shall be paid by the district responsible for providing transportation pursuant to subdivision 6 or 7 and transportation aid shall be paid to that district.

Subd. 6. **Placement in another district; responsibility.** The responsibility for special instruction and services for a child with a disability temporarily placed in another district for care and treatment shall be determined in the following manner:

(a) The school district of residence of a child shall be the district in which the child's parent resides, if living, or the child's guardian, or the district designated by the commissioner of education if neither parent nor guardian is living within the state.

(b) When a child is temporarily placed for care and treatment in a day program located in another district and the child continues to live within the district of residence during the care and treatment, the district of residence is responsible for providing transportation and an appropriate educational program for the child. The district may provide the educational program at a school within the district of residence, at the child's residence, or in the district in which the day treatment center is located by paying tuition to that district.

(c) When a child is temporarily placed in a residential program for care and treatment, the nonresident district in which the child is placed is responsible for providing an appropriate educational program for the child and necessary transportation within the district while the child is attending the educational program; and shall bill the district of the child's

residence for the actual cost of providing the program, as outlined in subdivision 4, except that the board, lodging, and treatment costs incurred in behalf of a child with a disability placed outside of the school district of residence by the commissioner of human services or the commissioner of corrections or their agents, for reasons other than for making provision for the child's special educational needs shall not become the responsibility of either the district providing the instruction or the district of the child's residence.

(d) The district of residence shall pay tuition and other program costs, not including transportation costs, to the district providing the instruction and services. The district of residence may claim general education aid for the child as provided by law. Transportation costs shall be paid by the district responsible for providing the transportation and the state shall pay transportation aid to that district.

Subd. 7. **Placement in state institution; responsibility.** Responsibility for special instruction and services for a child with a disability placed in a state institution on a temporary basis shall be determined in the following manner:

(a) The legal residence of such child shall be the school district in which the child's parent resides, if living, or the child's guardian.

(b) When the educational needs of such child can be met through the institutional program, the costs for such instruction shall be paid by the department to which the institution is assigned.

(c) When it is determined that such child can benefit from public school enrollment, provision for such instruction shall be made in the following manner: (1) determination of eligibility for special instruction and services shall be made by the commissioner of education and the commissioner of the department responsible for the institution;

(2) the school district where the institution is located shall be responsible for providing transportation and an appropriate

educational program for the child and shall make a tuition charge to the child's district of residence for the actual cost of providing the program;

(3) the district of the child's residence shall pay the tuition and other program costs excluding transportation costs and may claim general education aid for the child. Transportation costs shall be paid by the district where the institution is located and the state shall pay transportation aid to that district.

Subd. 7a. **Attendance at school for the disabled.** Responsibility for special instruction and services for a visually disabled or hearing impaired child attending the Minnesota state academy for the deaf or the Minnesota state academy for the blind shall be determined in the following manner:

(a) The legal residence of the child shall be the school district in which the child's parent or guardian resides.

(b) When it is determined pursuant to section 128A.05, subdivision 1 or 2, that the child is entitled to attend either school, the state board shall provide the appropriate educational program for the child. The state board shall make a tuition charge to the child's district of residence for the cost of providing the program. The amount of tuition charged shall not exceed the basic revenue of the district for that child, for the amount of time the child is in the program. For purposes of this subdivision, "basic revenue" has the meaning given it in section 124A.22, subdivision 2. The district of the child's residence shall pay the tuition and may claim general education aid for the child. Tuition received by the state board, except for tuition received under clause (c), shall be deposited in the state treasury as provided in clause (g).

(c) In addition to the tuition charge allowed in clause (b), the academies may charge the child's district of residence for the academy's unreimbursed cost of providing an instructional aide assigned to that child, if that aide is required by the child's

individual education plan. Tuition received under this clause must be used by the academies to provide the required service.

(d) When it is determined that the child can benefit from public school enrollment but that the child should also remain in attendance at the applicable school, the school district where the institution is located shall provide an appropriate educational program for the child and shall make a tuition charge to the state board for the actual cost of providing the program, less any amount of aid received pursuant to section 124.32. The state board shall pay the tuition and other program costs including the unreimbursed transportation costs. Aids for children with a disability shall be paid to the district providing the special instruction and services. Special transportation shall be provided by the district providing the educational program and the state shall reimburse such district within the limits provided by law.

(e) Notwithstanding the provisions of clauses (b) and (d), the state board may agree to make a tuition charge for less than the amount specified in clause (b) for pupils attending the applicable school who are residents of the district where the institution is located and who do not board at the institution, if that district agrees to make a tuition charge to the state board for less than the amount specified in clause (d) for providing appropriate educational programs to pupils attending the applicable school.

(f) Notwithstanding the provisions of clauses (b) and (d), the state board may agree to supply staff from the Minnesota state academy for the deaf and the Minnesota state academy for the blind to participate in the programs provided by the district where the institutions are located when the programs are provided to students in attendance at the state schools.

(g) On May 1 of each year, the state board shall count the actual number of Minnesota resident kindergarten and elementary students and the actual number of Minnesota resident secondary students enrolled and receiving education

services at the Minnesota state academy for the deaf and the Minnesota state academy for the blind. The state board shall deposit in the state treasury an amount equal to all tuition received less:

(1) the total number of students on May 1 less 175, times the ratio of the number of kindergarten and elementary students to the total number of students on May 1, times the general education formula allowance; plus

(2) the total number of students on May 1 less 175, times the ratio of the number of secondary students on May 1 to the total number of students on May 1, times 1.3, times the general education formula allowance.

(h) The sum provided by the calculation in clause (g), subclauses (1) and (2), must be deposited in the state treasury and credited to the general operation account of the academy for the deaf and the academy for the blind.

(i) There is annually appropriated to the department of education for the Faribault academies the tuition amounts received and credited to the general operation account of the academies under this section. A balance in an appropriation under this paragraph does not cancel but is available in successive fiscal years.

Subd. 8. [Repealed, 1973 c 683 s 30]

Subd. 8a. **Residence of child under special conditions.** The legal residence of a child with a disability placed in a foster facility for care and treatment when:

(1) parental rights have been terminated by court order,

(2) parent or guardian is not living within the state;

(3) no other school district residence can be established; or

(4) parent or guardian having legal custody of the child is an inmate of a Minnesota correctional facility or is a resident of a halfway house under the supervision of the commissioner of corrections;

shall be the school district in which the child resides. The school board of the district of residence shall provide the same educational program for such child as it provides for all resident children with a disability in the district.

Subd. 9. **Special instruction.** No resident of a district who is eligible for special instruction and services pursuant to this section shall be denied provision of this instruction and service on a shared time basis because of attendance at a nonpublic school defined in section 123.932, subdivision 3. If a resident pupil with a disability attends a nonpublic school located within the district of residence, the district shall provide necessary transportation for that pupil within the district between the nonpublic school and the educational facility where special instruction and services are provided on a shared time basis. If a resident pupil with a disability attends a nonpublic school located in a district contiguous to the district of residence and if no agreement exists pursuant to section 124A.034, subdivision 1 or 1 a, for the provision of special instruction and services on a shared time basis to that pupil by the district of attendance, the district of residence shall provide necessary transportation for that pupil between the boundary of the district of residence and the educational facility where the special instruction and services are provided within the district of residence. The district of residence may provide necessary transportation for that pupil between its boundary and the nonpublic school attended, but the nonpublic school shall pay the cost of transportation provided outside the district boundary.

Subd. 10. **Nonresident education; billing.** All tuition billing for the education of nonresident children pursuant to this section shall be done on uniform forms prescribed by the commissioner. The billing shall contain an itemized statement of costs which are being charged to the district of residence. One copy of each such billing shall be filed with the commissioner.

Subd. 11. **Transportation aid agreements.** Notwithstanding the provisions of subdivisions 4, 5a, and 6, when a child receives special instruction and services in a day program outside the resident district, the resident district and the nonresident district where the child is placed may enter into an agreement providing for the nonresident district to pay the cost of any particular transportation categories specified in section 124.225, subdivision 1, and claim transportation aid for those categories. In this case, the nonresident district may not obtain any payment from the resident district for the categories covered by the agreement.

Subd. 11a. MS 1993 Supp [Renumbered 120.1701, subd 3]

Subd. 11b. MS 1993 Supp [Renumbered 120.1701, subd 4]

Subd. 12. MS 1993 Supp [Renumbered 120.1701, subd 5]

Subd. 13. MS 1986 [Repealed, 1987 c 398 art 3 s 41]

Subd. 14. MS 1993 Supp [Renumbered 120.1701, subd 12]

Subd. 14a. MS 1993 Supp [Renumbered 120.1701, subd 13]

Subd. 15. **Third party payment.** Nothing in this section relieves an insurer or similar third party from an otherwise valid obligation to pay, or changes the validity of an obligation to pay, for services rendered to a child with a disability, and the child's family.

Subd. 16. **Community transition interagency committee.** A district, group of districts, or special education cooperative, in cooperation with the county or counties in which the district or cooperative is located, shall establish a community transition interagency committee for youth with disabilities, beginning at grade 9 or age equivalent, and their families. Members of the committee shall consist of representatives from special education; vocational and regular education; community education; post-secondary education and training institutions; adults with disabilities who have received transition services if such persons are available; parents of youth with disabilities; local business or industry; rehabilitation services; county social services; health agencies;

and additional public or private adult service providers as appropriate. The committee shall elect a chair and shall meet regularly. The committee shall:

(1) identify current services, programs, and funding sources provided within the community for secondary and post-secondary aged youth with disabilities and their families;

(2) facilitate the development of multiagency teams to address present and future transition needs of individual students on their individual education plans;

(3) develop a community plan to include mission, goals, and objectives, and an implementation plan to assure that transition needs of individuals with disabilities are met;

(4) recommend changes or improvements in the community system of transition services;

(5) exchange agency information such as appropriate data, effectiveness studies, special projects, exemplary programs, and creative funding of programs; and

(6) following procedures determined by the commissioner, prepare a yearly summary assessing the progress of transition services in the community including follow-up of individuals with disabilities who were provided transition services to determine postschool outcomes. The summary must be disseminated to all adult services agencies involved in the planning and to the commissioner of education by October 1 of each year.

Subd. 17. MS 1993 Supp [Renumbered 120.1701, subd 22]

Subd. 18. **Agency access to nonpublic data.** The commissioner of administration shall prepare a form and disseminate guidelines for state agencies, political subdivisions, and other responsible authorities to use to enable a responsible authority to allow another responsible authority access to data about a child with a disability that is classified as not public. The form and guidelines must be consistent

with section 13.05, subdivision 9, and federal law, and are not subject to the rulemaking requirements under chapter 14.

History: *Ex1959 c 71 art 1 s 17; 1961 c 559 s 2, 1961 c 690 s 1; 1965 c 241 s 1-3; 1967 c 872 s 1; 1969 c 981 s 2-5; 1971 c 689 s 1-3; 1973 c 683 s 1,2, 1975 c 162 s 41; 1975 c 321 s 2; 1975 c 432 s 8-10; 1976 c 211 s 1-6; 1976 c 271 s 13-18; 1977 c 447 art 3 s 1-4; 1977 c 449 s 12; 1978 c 733 s 1; 1978 c 764 s 3-5; 1978 c 793 s 61; 1979 c 334 art 2 s 1,2; art 3 s 2,3; 1980 c 509 s 30; 1981 c 358 art 1 s 1; art 3 s 2-7; 1982 c 424 s 28,29,130; 1982 c 548 art 3 s 1-3; 1983 c 24 7 s 55; 1983 c 258 s 13; 1983 c 314 art 1 s 22; art 3 s 1; 1984 c 463 art 3 s 1; 1984 c 654 art 5 s 58; 1Sp1985 c 12 art 3 s 2-8; 1986 c 444, 1987 c 384 art 2 s 24, 1987 c 398 art 3 s 2-14; 1988 c 486 s 2-5; 1988 c 629 s 24; 1988 c 718 art 3 s 1; art 6 s 2; 1989 c 209 art 2 s 1; 1989 c 329 art 3 s 1-3; 1991 c 265 art 3 s 1,2,38, art 11 s 1; 1991 c 292 art 6 s 58 subd 2; 1992 c 499 art 3 s 1-7; art 11 s 1; 1993 c 224 art 3 s 1-9; art 14 s 3; 1994 c 483 s 1; 1994 c 647 art 3 s 2-8,34*

[For text of subds 5 and 6, see M.S. 1994]

History: *1Sp1995 c 3 art 16 s 13*

120.1045 BACKGROUND CHECK.

Subdivision 1. **Background check required.** A school hiring authority shall request a criminal history background check from the superintendent of the bureau of criminal apprehension on all individuals who are offered employment in the school. In order to be eligible for employment, an individual who is offered employment must provide an executed criminal history consent form and a money order or cashier's check payable to the bureau of criminal apprehension for the fee for conducting the criminal history background check. A school may charge a person offered employment an additional fee of up to $2 to cover the school's costs under this section. The superintendent shall perform the background check by retrieving criminal history data maintained in the criminal justice information system computers.

Subd. 2. **Conditional hiring; discharge.** A school hiring authority may hire an individual pending completion of a background check under subdivision 1 but shall notify the individual that the individual's employment may be terminated based on the result of the background check. A school hiring authority is not liable for failing to hire or for terminating an individual's employment based on the result of a background check under this section.

Subd. 3. **Exemption.** The requirements of this section do not apply to hiring authorities of home schools.

History: *1995 c 226 art 3 s 2*

120.105 EDUCATION STATEMENT.

Each year every school, as defined in section 120.101, subdivision 4, offering a kindergarten program must ensure that the school principal, kindergarten teacher, or other professional, discusses and distributes the following statement to every parent, guardian. or other person enrolling a child in kindergarten:

"The state of Minnesota requires that every child entering kindergarten this school year must graduate from high school or remain in high school or in an alternative program until age 18. Only those who have been accepted in the military or an institution of higher learning can leave school before they are 18 years old."

The department of children, families, and learning must make appropriate provisions to accommodate those children who newly enroll in a public school after kindergarten. All other schools must make similar provisions.

History: *1Sp1995 c 3 art 16 s 13*

120.14 ATTENDANCE OFFICERS.

The board of any district may authorize the employment of attendance officers, who shall investigate truancy or nonattendance at school, make complaints, serve notice and process, and attend to the enforcement of all laws and district rules regarding school attendance. When any attendance officer learns of any case of habitual truancy or continued nonattendance of any child required to attend school the officer shall immediately notify the person having control of such child to forthwith send to and keep the child in school. The attendance officer shall also refer a habitual truant child as defined in section 260.015, subdivision 19, and the child's parent or legal guardian to appropriate services and procedures under chapter 260A, if available within the school district. Attendance officers or other designated school

officials shall ensure that the notice required by section 260A.03 for a child who is a continuing truant is sent. The officer shall act under the general supervision of the district superintendent.

History: *1995 c 226 art 3 s 3*

120.17 CHILDREN WITH A DISABILITY.

[For text of subds 1 to 3, see M.S. 1994]

Subd. 3a. **School district obligations.** Every district shall ensure that:

(1) all students with disabilities are provided the special instruction and services which are appropriate to their needs. Where the individual education plan team has determined appropriate goals and objectives based on the student's needs, including the extent to which the student can be included in the least restrictive environment, and where there are essentially equivalent and effective instruction, related services, or assistive technology devices available to meet the student's needs, cost to the school district may be among the factors considered by the team in choosing how to provide the appropriate services, instruction, or devices that are to be made part of the student's individual education plan. The student's needs and the special education instruction and services to be provided shall be agreed upon through the development of an individual education plan. The plan shall address the student's need to develop skills to live and work as independently as possible within the community. By grade 9 or age 14, the plan shall address the student's needs for transition from secondary services to post-secondary education and training, employment, community participation, recreation, and leisure and home living. The plan must include a statement of the needed transition services, including a

statement of the interagency responsibilities or linkages or both before secondary services are concluded;

(2) children with a disability under age five and their families are provided special instruction and services appropriate to the child's level of functioning and needs;

(3) children with a disability and their parents or guardians are guaranteed procedural safeguards and the right to participate in decisions involving identification, assessment and educational placement of children with a disability;

(4) to the maximum extent appropriate, children with a disability, including those in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with a disability from the regular educational environment occurs only when and to the extent that the nature or severity of the disability is such that education in regular classes with the use of supplementary services cannot be achieved satisfactorily;

(5) in accordance with recognized professional standards, testing and evaluation materials, and procedures utilized for the purposes of classification and placement of children with a disability are selected and administered so as not to be racially or culturally discriminatory; and

(6) the rights of the child are protected when the parents or guardians are not known or not available, or the child is a ward of the state.

Subd. 3b. **Procedures for decisions.** Every district shall utilize at least the following procedures for decisions involving identification, assessment, and educational placement of children with a disability:

(a) Parents and guardians shall receive prior written notice of:

(1) any proposed formal educational assessment or proposed denial of a formal educational assessment of their child,

(2) a proposed placement of their child in, transfer from or to, or denial of placement in a special education program; or

(3) the proposed provision, addition, denial or removal of special education services for their child;

(b) The district shall not proceed with the initial formal assessment of a child, the initial placement of a child in a special education program, or the initial provision of special education services for a child without the prior written consent of the child's parent or guardian. The refusal of a parent or guardian to consent may be overridden by the decision in a hearing held pursuant to clause (e) at the district's initiative;

(c) Parents and guardians shall have an opportunity to meet with appropriate district staff in at least one conciliation conference, mediation, or other method of alternative dispute resolution that the parties agree to, if they object to any proposal of which they are notified pursuant to clause (a). The conciliation process or other form of alternative dispute resolution shall not be used to deny or delay a parent or guardian's right to a due process hearing. If the parent or guardian refuses efforts by the district to conciliate the dispute with the school district, the requirement of an opportunity for conciliation or other alternative dispute resolution shall be deemed to be satisfied. Notwithstanding other law, in any proceeding following a conciliation conference, the school district must not offer a conciliation conference memorandum into evidence, except for any portions that describe the district's final proposed offer of service. Otherwise, with respect to forms of dispute resolution, mediation, or conciliation, Minnesota Rule of Evidence 408 applies. The department of children, families, and learning may reimburse the districts or directly pay the costs of lay advocates, not to exceed $150 per dispute, used in conjunction with alternative dispute resolution.

(d) The commissioner shall establish a mediation process to assist parents, school districts, or other parties to resolve disputes arising out of the identification, assessment, or educational placement of children with a disability. The mediation process must be offered as an informal alternative to the due process hearing provided under clause (e), but must not be used to deny or postpone the opportunity of a parent or guardian to obtain a due process hearing.

(e) Parents, guardians, and the district shall have an opportunity to obtain an impartial due process hearing initiated and conducted by and in the school district responsible for assuring that an appropriate program is provided in accordance with state board rules, if the parent or guardian continues to object to:

(1) a proposed formal educational assessment or proposed denial of a formal educational assessment of their child;

(2) the proposed placement of their child in, or transfer of their child to a special education program;

(3) the proposed denial of placement of their child in a special education program or the transfer of their child from a special education program;

(4) the proposed provision or addition of special education services for their child; or

(5) the proposed denial or removal of special education services for their child.

Within five business days after the request for a hearing, or as directed by the hearing officer, the objecting party shall provide the other party with a brief written statement of particulars of the objection, the reasons for the objection, and the specific remedies sought. The other party shall provide the objecting party with a written response to the statement of objections within five business days of receipt of the statement.

The hearing shall take place before an impartial hearing officer mutually agreed to by the school board and the parent or guardian. If the school board and the parent or guardian are unable to agree on a hearing officer, the school board shall request the commissioner to appoint a hearing officer. The hearing officer shall not be a school board member or employee of the school district where the child resides or of the child's school district of residence, an employee of any other public agency involved in the education or care of the child, or any person with a personal or professional interest which would conflict with the person's objectivity at the hearing. A person who otherwise qualifies as a hearing officer is not an employee of the district solely because the person is paid by the district to serve as a hearing officer. If the hearing officer requests an independent educational assessment of a child, the cost of the assessment shall be at district expense. The proceedings shall be recorded and preserved, at the expense of the school district, pending ultimate disposition of the action.

(f) The decision of the hearing officer pursuant to clause (e) shall be rendered not more than 45 calendar days from the date of the receipt of the request for the hearing. A hearing officer may grant specific extensions of time beyond the 45-day period at the request of either party. The decision of the hearing officer shall be binding on all parties unless appealed to the hearing review officer by the parent, guardian, or the school board of the district where the child resides pursuant to clause (g).

The local decision shall:

(1) be in writing;

(2) state the controlling facts upon which the decision is made in sufficient detail to apprise the parties and the hearing review officer of the basis and reason for the decision;

(3) state whether the special education program or special education services appropriate to the child's needs can be

reasonably provided within the resources available to the responsible district or districts.

(4) state the amount and source of any additional district expenditure necessary to implement the decision; and

(5) be based on the standards set forth in subdivision 3a and the rules of the state board.

(g) Any local decision issued pursuant to clauses (e) and (f) may be appealed to the hearing review officer within 30 calendar days of receipt of that written decision, by the parent, guardian, or the school board of the district responsible for assuring that an appropriate program is provided in accordance with state board rules.

If the decision is appealed, a written transcript of the hearing shall be made by the school district and shall be accessible to the parties involved within five calendar days of the filing of the appeal. The hearing review officer shall issue a final independent decision based on an impartial review of the local decision and the entire record within 30 calendar days after the filing of the appeal. The hearing review officer shall seek additional evidence if necessary and may afford the parties an opportunity for written or oral argument, provided any hearing held to seek additional evidence shall be an impartial due process hearing but shall be deemed not to be a contested case hearing for purposes of chapter 14. The hearing review officer may grant specific extensions of time beyond the 30-day period at the request of any party.

The final decision shall:

(1) be in writing,

(2) include findings and conclusions; and

(3) be based upon the standards set forth in subdivision 3a and in the rules of the state board.

(h) The decision of the hearing review officer shall be final unless appealed by the parent or guardian or school board to the court of appeals. The judicial review shall be in accordance with chapter 14.

(i) The commissioner of children, families, and learning shall select an individual who has the qualifications enumerated in this paragraph to serve as the hearing review officer:

(1) the individual must be knowledgeable and impartial;

(2) the individual must not have a personal interest in or specific involvement with the student who is a party to the hearing;

(3) the individual must not have been employed as an administrator by the district that is a party to the hearing;

(4) the individual must not have been involved in the selection of the administrators of the district that is a party to the hearing;

(5) the individual must not have a personal, economic, or professional interest in the outcome of the hearing other than the proper administration of the federal and state laws, rules, and policies;

(6) the individual must not have substantial involvement in the development of a state or local policy or procedures that are challenged in the appeal; and

(7) the individual is not a current employee or board member of a Minnesota public school district, education district, intermediate unit or regional education agency, the department of children, families, and learning, the state board of education, or a parent advocacy organization or group.

(j) In all appeals, the parent or guardian of the pupil with a disability or the district that is a party to the hearing may challenge the impartiality or competence of the proposed hearing review officer by applying to the hearing review officer.

(k) Pending the completion of proceedings pursuant to this subdivision, unless the district and the parent or guardian of the child agree otherwise, the child shall remain in the child's current educational placement and shall not be denied initial admission to school.

(l) The child's school district of residence, a resident district, and providing district shall receive notice of and may be a party to any hearings or appeals under this subdivision.

(m) A school district is not liable for harmless technical violations of this subdivision or rules implementing this subdivision if the school district can demonstrate on a case-by-case basis that the violations did not harm the student's educational progress or the parent or guardian's right to notice, participation, or due process.

(n) Within ten calendar days after appointment, the hearing officer shall schedule and hold a prehearing conference. At that conference, or later, the hearing officer may take any appropriate action that a court might take under Rule 16 of Minnesota Rules of Civil Procedure including, but not limited to, scheduling, jurisdiction, and listing witnesses including expert witnesses.

(o) A hearing officer or hearing review officer appointed under this subdivision shall be deemed to be an employee of the state under section 3.732 for the purposes of section 3.736 only.

(p) In order to be eligible for selection, hearing officers and hearing review officers shall participate in training and follow procedures as designated by the commissioner.

Subd. 3d. **Interagency services.** If at the time of initial referral for an educational assessment, or a reassessment, the school district determines that a child with disabilities who is age 3 through 21 may be eligible for interagency services, the district may request that the county of residence provide a representative to the initial assessment or reassessment team meeting or the first individual education plan team meeting following the assessment or reassessment. The district may request to have a county representative attend other individual education plan team meetings when it is necessary to facilitate coordination between district and county provided services. Upon request from a school district, the resident county shall

provide a representative to assist the individual education plan team in determining the child's eligibility for existing health, mental health, or other support services administered or provided by the county. The individual education plan team and the county representative shall develop an interagency plan of care for an eligible child and the child's family to coordinate services required under the child's individual education plan with county services. The interagency plan of care shall include appropriate family information with the consent of the family, a description of how services will be coordinated between the district and county, a description of service coordinator responsibilities and services, and a description of activities for obtaining third-party payment for eligible services, including medical assistance payments.

[For text of subds 4 to 5a, see M.S. 1994]

Subd. 6. **Placement in another district; responsibility.** The responsibility for special instruction and services for a child with a disability temporarily placed in another district for care and treatment shall be determined in the following manner:

(a) The school district of residence of a child shall be the district in which the child's parent resides, if living, or the child's guardian, or the district designated by the commissioner of children, families, and learning if neither parent nor guardian is living within the state.

(b) When a child is temporarily placed for care and treatment in a day program located in another district and the child continues to live within the district of residence during the care and treatment, the district of residence is responsible for providing transportation and an appropriate educational program for the child. The district may provide the educational program at a school within the district of residence, at the child's residence, or in the district in which

the day treatment center is located by paying tuition to that district.

(c) When a child is temporarily placed in a residential program for care and treatment, the nonresident district in which the child is placed is responsible for providing an appropriate educational program for the child and necessary transportation within the district while the child is attending the educational program; and shall bill the district of the child's residence for the actual cost of providing the program, as outlined in subdivision 4, except that the board, lodging, and treatment costs incurred in behalf of a child with a disability placed outside of the school district of residence by the commissioner of human services or the commissioner of corrections or their agents, for reasons other than for making provision for the child's special educational needs shall not become the responsibility of either the district providing the instruction or the district of the child's residence.

(d) The district of residence shall pay tuition and other program costs, not including transportation costs, to the district providing the instruction and services. The district of residence may claim general education aid for the child as provided by law. Transportation costs shall be paid by the district responsible for providing the transportation and the state shall pay transportation aid to that district.

Subd. 7. **Placement in state institution; responsibility.** Responsibility for special instruction and services for a child with a disability placed in a state institution on a temporary basis shall be determined in the following manner:

(a) The legal residence of such child shall be the school district in which the child's parent resides, if living, or the child's guardian.

(b) When the educational needs of such child can be met through the institutional program, the costs for such instruction shall be paid by the department to which the institution is assigned.

(c) When it is determined that such child can benefit from public school enrollment, provision for such instruction shall be made in the following manner:

(1) determination of eligibility for special instruction and services shall be made by the commissioner of children, families, and learning and the commissioner of the department responsible for the institution;

(2) the school district where the institution is located shall be responsible for providing transportation and an appropriate educational program for the child and shall make a tuition charge to the child's district of residence for the actual cost of providing the program;

(3) the district of the child's residence shall pay the tuition and other program costs excluding transportation costs and may claim general education aid for the child. Transportation costs shall be paid by the district where the institution is located and the state shall pay transportation aid to that district.

Subd. 7a. **Attendance at school for the disabled.** Responsibility for special instruction and services for a visually disabled or hearing impaired child attending the Minnesota state academy for the deaf or the Minnesota state academy for the blind shall be determined in the following manner:

(a) The legal residence of the child shall be the school district in which the child's parent or guardian resides.

(b) When it is determined pursuant to section 128A.05, subdivision 1 or 2, that the child is entitled to attend either school, the state board shall provide the appropriate educational program for the child. The state board shall make a tuition charge to the child's district of residence for the cost of providing the program. The amount of tuition charged shall not exceed the basic revenue of the district for that child, for the amount of time the child is in the program. For purposes of this subdivision, "basic revenue" has the meaning given it in section 124A.22, subdivision 2. The district of the child's

residence shall pay the tuition and may claim general education aid for the child. Tuition received by the state board, except for tuition received under clause (c), shall be deposited in the state treasury as provided in clause (g).

(c) In addition to the tuition charge allowed in clause (b), the academies may charge the child's district of residence for the academy's unreimbursed cost of providing an instructional aide assigned to that child, if that aide is required by the child's individual education plan. Tuition received under this clause must be used by the academies to provide the required service.

(d) When it is determined that the child can benefit from public school enrollment but that the child should also remain in attendance at the applicable school, the school district where the institution is located shall provide an appropriate educational program for the child and shall make a tuition charge to the state board for the actual cost of providing the program, less any amount of aid received pursuant to section 124.32. The state board shall pay the tuition and other program costs including the unreimbursed transportation costs. Aids for children with a disability shall be paid to the district providing the special instruction and services. Special transportation shall be provided by the district providing the educational program and the state shall reimburse such district within the limits provided by law.

(e) Notwithstanding the provisions of clauses (b) and (d), the state board may agree to make a tuition charge for less than the amount specified in clause (b) for pupils attending the applicable school who are residents of the district where the institution is located and who do not board at the institution, if that district agrees to make a tuition charge to the state board for less than the amount specified in clause (d) for providing appropriate educational programs to pupils attending the applicable school.

(f) Notwithstanding the provisions of clauses (b) and (d), the state board may agree to supply staff from the Minnesota

state academy for the deaf and the Minnesota state academy for the blind to participate in the programs provided by the district where the institutions are located when the programs are provided to students in attendance at the state schools.

(g) On May 1 of each year, the state board shall count the actual number of Minnesota resident kindergarten and elementary students and the actual number of Minnesota resident secondary students enrolled and receiving education services at the Minnesota state academy for the deaf and the Minnesota state academy for the blind. The state board shall deposit in the state treasury an amount equal to all tuition received less:

(1) the total number of students on May 1 less 175, times the ratio of the number of kindergarten and elementary students to the total number of students on May 1, times the general education formula allowance; plus

(2) the total number of students on May 1 less 175, times the ratio of the number of secondary students on May 1 to the total number of students on May 1, times 1.3, times the general education formula allowance.

(h) The sum provided by the calculation in clause (g), subclauses (1) and (2), must be deposited in the state treasury and credited to the general operation account of the academy for the deaf and the academy for the blind.

(i) There is annually appropriated to the department of children, families, and learning for the Faribault academies the tuition amounts received and credited to the general operation account of the academies under this section. A balance in an appropriation under this paragraph does not cancel but is available in successive fiscal years.

[For text of subds 8a to 15, see M.S. 1994]

Subd. 16. **Community transition interagency committee.** A district, group of districts, or special education

cooperative, in cooperation with the county or counties in which the district or cooperative is located, shall establish a community transition interagency committee for youth with disabilities, beginning at grade 9 or age equivalent, and their families. Members of the committee shall consist of representatives from special education; vocational and regular education; community education; post-secondary education and training institutions; adults with disabilities who have received transition services if such persons are available; parents of youth with disabilities; local business or industry; rehabilitation services; county social services; health agencies; and additional public or private adult service providers as appropriate. The committee shall elect a chair and shall meet regularly. The committee shall:

(1) identify current services, programs, and funding sources provided within the community for secondary and post-secondary aged youth with disabilities and their families;

(2) facilitate the development of multiagency teams to address present and future transition needs of individual students on their individual education plans;

(3) develop a community plan to include mission, goals, and objectives, and an implementation plan to assure that transition needs of individuals with disabilities are met;

(4) recommend changes or improvements in the community system of transition services;

(5) exchange agency information such as appropriate data, effectiveness studies, special projects, exemplary programs, and creative funding of programs; and

(6) following procedures determined by the commissioner, prepare a yearly summary assessing the progress of transition services in the community including follow-up of individuals with disabilities who were provided transition services to determine postschool outcomes. The summary must be disseminated to all adult services agencies

involved in the planning and to the commissioner of children, families, and learning by October 1 of each year.

[For text of subd 18, see M.S. 1994]

History: *1Sp1995 c 3 art 3 s 1-3; art 16 s 13*

TREATMENT PROGRAMS AND LEVELS OF SERVICE

3525.2325 EDUCATION PROGRAMS FOR K-12 PUPILS AND REGULAR STUDENTS PLACED IN CENTERS FOR CARE AND TREATMENT.

Subpart 1. **When education is required.** The district in which the facility is located must provide regular education, special education, or both, to a pupil or regular education student in kindergarten through grade 12 placed in a facility, or in the student's home for care and treatment. Education services must be provided to a pupil or regular education student who is:

A. prevented from attending the pupil's or student's normal school site for 15 consecutive days; or

B. predicted to be absent from the normal school site for 15 consecutive days according to the placing authority, such as a medical doctor, psychologist, psychiatrist, judge, or other court-appointed authority; or

C. health-impaired and in need of special education and predicted by the team to be absent from the normal school site for 15 intermittent days.

A pupil or regular education student shall begin receiving instruction as soon as practicable under treatment conditions.

Special education services must be provided as required by a pupil's IEP, and to the extent that treatment considerations allow the pupil to participate. Number of school days for determining due process procedures shall begin upon enrollment in an education program. Placement for care and treatment does not of itself require special education placement.

D. For those education programs run by the Department of Corrections, the district shall be the

Department of Corrections for the purpose of this part. The district is responsible for ensuring that a cooperative agreement is reached with the care and treatment center facility which addresses all the requirements of Department of Human Services Rules, parts 9545.0900 to 9545.1090 and 9545.1400 to 9545.1500 which pertain to the provision of education services for students placed in centers for care and treatment. Provision of special education services requires implementation of all due process safeguards defined in state and federal law. Some procedures are modified to assure the pupil's access to education.

For purposes of this part, pupils and regular education students placed in the following facilities by someone other than the district are considered to be placed for care and treatment:

(1) chemical dependency and other substance abuse treatment centers;

(2) shelter care facilities;

(3) home, due to accident or illness;

(4) hospitals;

(5) day treatment centers;

(6) correctional facilities;

(7) residential treatment centers; and

(8) mental health programs.

Subp. 2. **Education programs for students and pupils and regular education students placed in short-term programs for care and treatment.** A placement for care and treatment is a short-term placement if the anticipated duration of the placement is less than 31 school days. The school district must begin to provide instruction to the pupil or regular education student immediately after the pupil or student is enrolled in the education program. If the student is enrolled in the educational program without an educational record or IEP, the district's procedures must include

immediate phone contact with the home school to see if the regular education student has been identified as disabled.

A. If a regular education student has been identified as disabled and has a current IEP:

Initial due process procedures for previously identified pupils placed for care and treatment in a short-term facility may be accomplished by telephone; however, the required written documentation, including notices, consent forms, and IEP's, must follow immediately. If the pupil has a current IEP in the home school, the home school must give the providing agency an oral review of the IEP goals and objectives and services provided. The providing agency must contact the parents and together an agreement must be reached about continuing or modifying special education services in accordance with the current IEP goals and objectives. If agreement is not reached over the phone, the providing district shall hold a team meeting as soon as possible. At least the following people shall receive written notice to attend: the person or agency placing the pupil, the resident district, the appropriate teachers and related services staff from the providing district, the parents, and, when appropriate, the pupil. This meeting may be held in conjunction with a meeting called by a placing agency. A copy of the documentation, including the modified IEP, must be provided to the parents with a copy of their rights, including a response form.

B. If a regular education student has not been identified as disabled or if the providing district cannot determine if a student has been identified as disabled:

(1) Regular education instruction must begin immediately upon enrollment in the education program.

(2) A screening must be conducted by education staff to determine the student's academic, social, and behavioral needs.

(3) Based on the documented results of the screening, a decision must be made about the need for

prereferral interventions or an appropriate special education assessment according to parts 3525.2550 to 3525.2750. It is not required that an appropriate assessment be started unless it appears that it can be completed.

(4) During the student's placement, regular education instruction must be provided.

Subp. 3. **Education programs for pupils and regular education students placed in long-term programs for care and treatment.** A placement made for care and treatment is long term if it is anticipated to extend beyond 30 school days. The pupil or regular education student must receive educational services immediately upon enrollment in the education program:

A. If the student has been identified as disabled and has a current IEP.

If the education staff of the providing district decides that the pupil's current IEP can be implemented while the pupil is placed for care and treatment, the education staff must contact the parents to secure an agreement to continue to provide special education services according to the IEP. If the parents do not agree with the providing district's proposal, the district shall hold a team meeting as soon as possible.

If the education staff needs additional assessment information or the pupil's current IEP cannot be fully implemented while the pupil is placed for care and treatment, the education staff must:

(1) contact the parents to secure an agreement to provide special education on an interim basis while an assessment is being completed; or

(2) call a team meeting to revise the current IEP or develop an interim IEP while the pupil is undergoing additional assessment to determine an appropriate program.

B. If the student has not been identified as disabled or if the providing district cannot determine if the student has been identified as disabled, the student entering a residential

facility for a long-term placement must be screened to determine if there is a need for an appropriate educational assessment. An assessment must begin with a review of screening and other information such as the parent or student interview, available educational and social history, and the purpose of the treatment placement. The assessment must be conducted according to parts 3525.2550 to 3525.2750.

If the student meets entrance criteria for special education, an IEP must be developed. Special education services must be provided by appropriately licensed staff in accordance with the IEP. If the student was not assessed or was assessed and does not meet entrance criteria for special education, regular education services must be provided in accordance with the student's education plan.

Subp. 4. **When a student or pupil leaves the facility.** If a student or pupil has received an assessment or special education services for 15 or more days, the providing district must prepare an exit report summarizing the regular education or special education assessment or service information and must send the report to the home school, the receiving facility, the parent, and any appropriate social service agency. For a pupil, this report must include a summary of current levels of performance, progress, and any modifications made in the pupil's IEP or services. Record transfers between anyone other than educational agencies and the parent require prior approval of the parents in accordance with data privacy laws.

Subp. 5. **Minimum service required.** The team must predict how long the pupil or regular education student must be placed for care and treatment. If the prediction is for a restricted period of more than 170 days or its equivalent, exclusive of summer school, the district shall make available:

A. the instruction necessary for the student or pupil to make progress in the appropriate grade level for the successful completion of the courses, programs, or classes the student or

pupil would have been enrolled in if the student or pupil were not placed for care and treatment;

B. preferably a normal school day in accordance with part 3525.2900, subpart 3;

C. an average of at least two hours a day of one-to-one instruction; or

D. a minimum of individualized instruction for one-half of the normal school day if it is justified in the pupil's IEP or student's education plan that none of these options are appropriate.

If the predicted restricted period is fewer than 171 days, exclusive of summer school, the district shall make available at a minimum either small group instruction for one-half of the normal school day or at least an average of one hour a day of one-to-one instruction.

Provision of special educational services for pupils outside of the providing school district's regular calendar is optional unless the pupil has an extended year IEP.

Subp. 6. **Placement, services, and due process requirements for pupils.**

A. The IEP developed by the team must include the provisions of part 3525.2900, the location of the special education services, the projected duration of the special education services, and provisions for coordinating the care and treatment and the special education services.

B. The nature of and the restrictiveness of some long-term facilities require the pupils to remain on site. When a pupil's treatment and educational needs allow, integration shall be provided in a regular educational setting. The determination of the amount and site of integrated services must be a joint decision between parents, the treatment and education staff, and when possible final educational placement decisions must be made by the IEP team of the providing educational agency. If the IEP team concludes a pupil can benefit from an average of more than three hours of

educational services, it must, in conjunction with care and treatment center staff, consider the feasibility and appropriateness of an education placement at a regular school site.

C. If a pupil is placed in a residential facility outside the resident district, the providing district must provide appropriate special education services. The placement of the pupil in a residential center for care and treatment outside the resident district is not an initial placement in the receiving district. The providing district shall make every effort to implement the resident district's IEP, making the modifications necessary due to the restrictive care and treatment setting and based on agreements reached with the parent. The providing district shall comply with the due process procedures of parts 3525.2550 to 3525.4700. Districts shall develop alternative procedures for implementing the legal requirements for observing the student in a regular classroom and document previous interventions that have been tried before the student placed for care and treatment is identified as having a specific learning disability or an emotional or behavioral disorder. These alternative procedures must be included in the district's entrance criteria. The district and facility shall cooperatively develop procedures to be used in emergency situations that comply with the Pupil Fair Dismissal Act according to Minnesota Statutes, sections 127.26 to 127.39, and the district's discipline policy.

Subp. 7. **Student's and pupil's and regular education student's placement; aid for special education.** Special education services provided to pupils and regular education students who have been placed for care and treatment are reimbursable in accordance with parts 3525.0800 and 3525.1310.

A. When regular education and special education services are provided, only the special education portion shall be reimbursed with special education aid.

B. The special education services provided to pupils in accordance with an IEP are reimbursable.

C. The indirect or consultative services provided in conjunction with regular education prereferral interventions and assessment provided to regular education students suspected of being disabled and who have demonstrated learning or behavioral problems in a screening are reimbursable.

D. Regular education, including screening, provided to students, pupils, and regular education students are not reimbursable with special education categorical aids.

SA: MS s 120.17; 121.11; L 1994 c 647 art 3 s 23
HIST: 14 SR 281; 16 SR 1543; 19 SR 2432

3525.2330 [Repealed, 19 SR 2432]

granted to all regular education students upon graduation or termination of special education services through age 21, with satisfactory attainment of the program plan objectives.

SA: MS s 120.17; 121.11; L 1994 c 647 art 3 s 23

HIST: 14 SR 281; 19 SR 2432

3525.3200 FORMAL NOTICE TO PARENTS.

The notice shall be in writing and shall be served on the parent. Every effort shall be made by the providing school district to assure that no person's rights are denied for lack of a parent, or surrogate parent, or duly appointed guardian. The notice shall be written in the primary language of the home and in English, and the district shall make reasonable provisions for such notice to nonreaders and non-English-speaking persons necessary to ensure that the information contained in the notice is understood. For parents who are disabled because of a hearing, speech, or other communication disorder, or because of the inability to speak or comprehend the English language as provided in Minnesota Statutes, section 546.42 the school district shall cause all pertinent proceedings, including but not limited to the conciliation conference, the prehearing review, the hearing, and any appeal to be interpreted in a language the person with a disability understands by a qualified interpreter as provided in Minnesota Statutes, section 546.42.

SA: MS s 120.17; 121.11; L 1994 c 647 art 3 s 23

HIST: 19 SR 2432

3525.3300 CONTENTS OF NOTICE.

Notices must be sufficiently detailed and precise to constitute adequate notice for hearing of the proposed action and contain a full explanation of the procedural safeguards

available to parents under parts 3525.0200 to 3525.4700. Notices must:

A. Inform the parents of their right and the procedure and time for them to participate as a team member in developing and determining their child's educational program, including special education services and to provide information relative to the child's assessment and the development of the program plan.

B. Inform the parents of their right and the procedure to receive interpretations of assessment or reassessment procedures, instruments and data or results and of the program plan from a knowledgeable school employee and for that conference to be held in private.

C. Inform the parents of their right and the procedure to have included on the team that interprets the assessment data and develops the individual program plans, the persons described in part 3525.2900, subpart 1, including a person who is a member of the same minority or cultural background or who is knowledgeable concerning the racial, cultural, or disability differences of the student.

D. Inform the parents that they may:

(1) Obtain an independent assessment at their own expense.

(2) Request from the district information about where an independent assessment may be obtained.

(3) Obtain an independent assessment at public expense if the parent disagrees with an assessment obtained by the district. The district shall initiate conciliation and a due process hearing if necessary when refusing a parent's request for an independent assessment at public expense. If the hearing officer determines that the district's assessment is appropriate, the parents still have the right to an independent assessment, but not at public expense. When an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation

and the qualifications of the examiner, must be the same as the criteria the district uses when it initiates an evaluation.

E. Inform the parents that the district will not proceed with proposed actions defined in part 3525.0200, subparts 7a and 8a, without prior written consent.

F. Inform the parents that if they notify the district in writing that they do not agree with the proposed assessment or placement, they will be requested to attend a conciliation conference at a mutually convenient time and place. If this is not an initial assessment or an initial placement being proposed by the district, the district must proceed with its proposal after ten school days of the parent's receipt of the notice and response form unless the parent objects in writing.

G. Inform the parents that if they do not wish to participate in a conciliation conference they have a right to proceed directly to an impartial due process hearing and bypass the informal conciliation conference. Even if they do attend a conciliation conference, if they do not agree with action proposed by the district, they have a right to proceed to a due process hearing. The conciliation process cannot be used to delay or deny the parents' rights to a due process hearing.

H. Inform the parents that they have the right to be represented by counsel or another person of their choosing at the conciliation conference or the impartial due process hearing.

I. Include a statement assuring that their child's educational program will not be changed as long as the parent objects to the proposed action, in the manner prescribed by parts 3525.0200 to 3525.4700.

J. Inform the parents of their right to be represented in preparation of and at the hearing by legal counsel or other representative of their choice.

K. Inform the parents of their right, in accordance with laws relating to confidentiality, to examine and receive

copies of the child's school records before the hearing, including tests, assessments, reports, or other information concerning the educational assessment or reassessment upon which the proposed action may be based.

L. Inform the parents of their right to call their own witnesses and to present evidence, including expert medical, psychological, and educational testimony and relevant records, tests, assessments, reports, or other information.

M. Inform the parents of their right to compel the attendance of any official or employee of the providing or resident school district or any other person, who may have evidence relating to the proposed action and the manner and time in which to do so.

N. Inform the parents of their right to present evidence and cross examine any employee of the school district or other persons who present evidence at the hearing.

O. Inform the parents of any free or low cost legal services available in the area.

P. Inform the parents of their right to have the child who is the subject of the hearing present at the hearing.

Q. Inform the parents that the hearing shall be closed unless the parents request an open hearing.

R. Inform the parents that they have a right to obtain a record of the hearing including the written findings of fact and decisions whether or not they appeal.

S. Inform the parents that if a due process hearing is held and the parents' position is upheld, the parents may be awarded attorney's fees by the courts in certain situations.

T. Inform the parents that their consent for their child's program and placement including the use of aversive and deprivation procedures is voluntary and that they may revoke it at any time.

U. Include a response form on which the parents may indicate their approval of or objection to the proposed action and identify the district employee to whom the response form

must be mailed or given and to whom questions may be directed.

V. Inform parents of a pupil's entitlement to special education until age 21 unless the team agrees the pupil no longer needs special education or the pupil is eligible for a high school diploma according to part 3525.3150.

SA: MS s 120.17; 121.11; L 1994 c 647 art 3 S 23

HIST: 8 SR 596; 14 SR 281; 16 SR 1543; 19 SR 2432

3525.3400 NOTICE TO RESIDENT SCHOOL DISTRICT.

The resident school district, if different from the providing school district, shall receive notice of and will be responsible for any hearings or appeals provided under parts 3525.0200 to 3525.4700 for pupils placed by the resident district if the providing district notifies the school district according to part 3525.0800, subpart 5.

SA: MS s 120.17

HIST: 14 SR 281

3525.3500 NOTICE OF PERFORMANCE OR REFUSAL TO PERFORM ASSESSMENT.

Before the performance of or refusal to perform an educational assessment or reassessment as provided in parts 3525.2550 to 3525.2750, the providing school district shall prepare and serve a notice that meets the requirements of parts 3525.3200 to 3525.3400. The portion of the notice which is specific to assessment or reassessment shall:

A. include the reasons for assessment or the refusal to assess and how the results may be used;

B. include a description of areas to be assessed and the procedures to be used;

C. state where and by whom the assessment will be conducted;

D. inform the parents that the district will not proceed with the initial formal assessment as defined in part 3525.0200, without prior written consent of the child's parents;

E. inform the parents that except for the initial formal assessment, the district shall proceed with the proposed assessment unless the parent objects on the enclosed response form or otherwise in writing within ten days after receipt of the notice; and

F. inform the parents that if the district refuses to perform the requested reassessment, the district shall initiate a hearing according to parts 3525.3800 to 3525.4700.

SA: MS s 120.17; 121.11; L 1994 c 647 art 3 s 23

HIST: 14 SR 281; 16 SR 1543; 19 SR 2432

3525.3600 NOTICE OF CHANCE OR REFUSAL TO CHANGE EDUCATIONAL PLACEMENT OR PROGRAM.

Before the initiation or significant change or the refusal to initiate or significantly change a pupil's educational placement or special education services, as set forth in part 3525.2900, subpart 1, item F, the school district shall prepare and serve a notice that meets the requirements of parts 3525.3200 to 3525.3400.

The portion of the notice which is specific to the educational placement and provision of services shall:

A. include a copy of the individual educational program plan as described in part 3525.2900, subpart 3;

B. inform the parents that the school district will not proceed with the initial placement and provision of services as defined in part 3525.0200 without prior written consent of the pupil's parents; and

C. inform the parents that except for the initial placement and provision of services, the district will proceed with the proposed placement and provision of services unless

the parents object in writing on the enclosed response form or otherwise in writing within ten days after the receipt of the notice.

SA: MS s 120.17; 121.11; L 1994 c 647 art 3 s 23

HIST: 14 SR 281; 16 SR 1543; L 1991 c 265 art 3 s 38; 19 SR 2432

3525.3700 CONCILIATION CONFERENCE.

Subpart 1. When a conference must be offered. If the parent does not object in writing, to a proposed action as set forth in parts 3525.2550 to 3525.2750 or part 3525.2900, subpart 5, within 14 days after receipt of the notice, and the proposed action is not an initial action as defined in part 3525.0200, subparts 7a and 8a, the proposed action shall take place. If a written objection is made, the resident school district shall offer the parent an opportunity to conciliate the matter. If the parent is willing to enter conciliation, the district shall arrange for a conference with the parent to review the reasons for the proposed action and conciliating the matter. The conference shall be held at a time and place mutually convenient to the parent and the school district representatives and shall be held within ten days after receipt of the written objection. There may be more than one conference and the parent or district may request a hearing under part 3525.3800 at any time.

If the parent refuses to provide prior written consent for initial assessment and initial placement under parts 3525.3500, item D, and 3525.3600, item A, subitem (2), within ten days after the receipt of the notice and response form, the district shall offer the parent an opportunity to conciliate the matter. If the parent is willing to enter conciliation, the district shall arrange for a conference with the parent to review the parent's suggestions and concerns, and to conciliate the matter. The conference shall be held at a time and place mutually

convenient to the parent and school district representatives. If no response is received in cases of initial assessment or placement, the school district shall offer a conciliation conference to be held within ten days after the expiration of the ten-day period for parent response. In cases where the parent fails to attend the initial conciliation conference, the district may choose to offer to schedule additional conciliation conferences.

Subp. 2. **Memorandum.** After the parents and district agree the final conciliation conference was held, the district shall serve the parent with a written memorandum within seven days that informs the parent:

A. Of the school district's proposed action following the conference.

B. That if they continue to object to the proposed action they have a right to object to the proposed action at an impartial due process hearing and the procedure and time in which to do so, including a request form on which the parent may request the hearing, and the identification of the district employee to whom the written request form or other written request for hearing should be mailed, and to whom questions and legal documents or requests relating to the hearing may be directed.

C. That if they do not request a hearing on the written request form or otherwise in writing pursuant to part 3525.3800 within seven days after receipt of the notice, the district will proceed with the proposed action; unless the proposed action is an initial action as defined in part 3525.0200, subparts 7a and 8a. In cases of proposed initial actions, when a parent continues to refuse to provide written permission, the district shall schedule a hearing within seven days after the expiration of the seven days allowed for parent response.

D. That if a hearing is scheduled, the district shall send a notice describing the rights and procedures available to the parents relative to the hearing.

Subp. 3. **Right to a hearing without conciliation.** The conciliation process must not be used to deny or delay a parent's right to a due process hearing. If the parent refuses efforts by the district to conciliate the dispute with the school district, the district's obligation to offer an opportunity for conciliation is satisfied.

When the parent refuses efforts by the district to conciliate the dispute and notifies the district of the intent to go to an impartial due process hearing, the district must provide the parent with the procedure and time in which to request the hearing, and the identification of the district employee to whom the written request form or other written request for a hearing must be mailed, and to whom questions and legal documents or requests about the hearing may be directed.

SA: MS s 120.17; 121.11; L 1994 c 647 art 3 s 23
HIST: 14 SR 281; 19 SR 2432

3525.3800 WHEN A HEARING MUST BE HELD.

A hearing regarding a proposed action under parts 3525.2550 to 3525.2750 or 3525.2900 shall be held whenever: (a) the district receives the parents' request for a hearing; (b) a parent refuses to provide written permission for the initial formal assessment or the initial placement and provision of special education services, within ten days after the receipt of the notice and response form, provided the district has made at least one offer to enter into conciliation in an attempt to obtain this written consent; and (c) when the district refuses to conduct a reassessment requested by a parent.

SA: MS s 120.17; 121.11; L 1994 c 647 art 3 s 23
HIST: 14 SR 281; 16 SR 1543; 19 SR 2432

3525.3900 NOTICE OF A HEARING.

Written notice of the time, date, and place of hearings shall be given to all parties by the district at least ten days in advance of the hearings; and the hearing shall be held at a time, date, and place mutually convenient to all parties.

Within five days of receipt of the parent's written request for a hearing, the district shall serve the parent with a written notice of rights and procedures relative to the hearing that informs the parent:

A. That the hearing shall take place before an impartial hearing officer mutually agreed to by the school board and the parent. If the school board and parent cannot agree on a hearing officer, the school board shall request the commissioner to appoint a hearing officer.

B. That they will receive notice of the time, date, and place of the hearing at least ten days in advance of the hearing which will be held within 30 days after the written request.

C. Inform the parents:

(1) of their right to receive a list of persons who will testify on behalf of the district concerning the proposed action within five days of the date the district receives their written request for the list of persons testifying;

(2) of their responsibility, within five days after written request by the school district, to provide to the district a list of persons who will testify on the parent's behalf concerning the proposed action;

(3) of their right, at least five days before the hearing, to receive from the district, a brief resume of additional material allegations referring to conduct, situations, or conditions which are discovered to be relevant and which were not contained in the original notice or memorandum; any party to a hearing has the right to prohibit evidence not disclosed five days before a hearing.

D. That at the hearing the burden of proof is on the district to show that the proposed action is justified on the basis of the person's educational needs or the person's current educational performance, or presenting disabilities taking into account the presumption that placement in a regular public school class with special education services is preferable to removal from the regular classroom.

E. That the hearing officer will make a written decision based only on evidence received and introduced into the record at the hearing not more than 45 days from the receipt of the request for the hearing and that the proposed action will be upheld only upon showing by the school district by a preponderance of the evidence. A proposed action that would result in the pupil being removed from regular education program may be sustained only when, and to the extent the nature or severity of the disability is such that a regular education program would not be satisfactory and the pupil would be better served in an alternative program. Consideration of alternative educational programs must also be given.

F. That the decision of the hearing officer is binding on all parties unless appealed to the commissioner by the parent or the district.

G. That unless the district and parents agree otherwise, the student shall not be denied initial admission to school and that the student's education program shall not be changed, as long as the parents object to the proposed action in the manner prescribed by parts 3525.0200 to 3525.4700.

SA: MS s 120.17; 121.11; L 1994 c 647 art 3 s 23

HIST: 14 SR 281; L 1991 c 265 art 3 s 38; 19 SR 2432

3525.4000 HEARING OFFICERS.

The hearing shall take place before an impartial hearing officer mutually agreed to by the school board and the parents. If the school board and the parents cannot agree on a hearing

officer, the school board shall request the commissioner to appoint a hearing officer. The hearing officer shall not be a school board member or employee of the school district where the student or child resides or of the child's school district of residence, an employee of any other public agency involved in the education or care of the child or regular education student, or any person with a personal or professional interest which would conflict with the person's objectivity at the hearing. A person who otherwise qualifies as a hearing officer is not an employee of the district solely because the person is paid by the district to serve as a hearing officer. If a hearing officer requests an independent educational assessment of a child or regular education student, the cost of the assessment shall be at district expense.

SA: MS s 120.17

HIST: 14 SR 281

3525.4100 PREHEARING REVIEW BY THE HEARING OFFICER.

Subpart 1. Information received before the hearing. Five days before the hearing, the person conducting the hearing shall receive copies of:

A. the district's notices and memorandum prepared pursuant to part 3525.3700, subpart 2, to the parents;

B. written information concerning the district's educational assessment or reassessment and copies of any parties' tests, evaluations, or other admissible reports or written information relating to the assessment or reassessment, or the proposed action;

C. a copy of the pupil's current and proposed IEP; and

D. other information from the district or parent as

FILED
NOV 12 1996
OFFICE OF THE CLERK

No. 96-604

(2)

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1996

Special School District No. 1,

Petitioner

v.

H.M.,

Respondent

On Petition for a Writ of Certiorari from
the Minnesota Court of Appeals

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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35 pp !

QUESTION PRESENTED

Respondent H.M. asserts that the question is not as stated by Petitioner Special School District No. 1 and should instead be phrased:

> Whether a school district may deny a due process hearing requested pursuant to both Minnesota law and the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400, et seq., to a student whose parents were attempting to resolve the matter through a form of state preferred alternative dispute resolution when the student was *involuntarily* removed from his home and placed in a correctional facility in another district, where the child's parents never moved and where the child has, in fact, returned to his parents' home?

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Respondent H.M. respectfully requests that this Honorable Court deny Petitioner Special School District No. 1's Petition for Writ of Certiorari for the reasons and arguments set forth below.

JURISDICTION

Respondent H.M. respectfully asserts that this Honorable Court lacks jurisdiction to even entertain Petitioner Special School District No. 1's Petition for Certiorari because it is untimely. Rule 13 of the Rules of the Supreme Court of the United States requires petitions to be filed within 90 days from the entry of an order by the highest court of a state which denies discretionary review. In Minnesota that is the Supreme Court. Rule 13(3) states that "[t]he time to file a petition. . . runs from the *date of entry of the judgment or order* sought to be reviewed, and *not from the issuance date of the mandate*." (emphasis added.) Minnesota Rule of Civil Appellate Procedure 136.02 states that when a petition for review to the State Supreme Court is denied, the "[j]udgment shall be entered immediately upon the denial of [the] petition for review. . . ." In this case, the order of the State Supreme Court was denied and necessarily entered on July 10, 1996. (See A-76 of Petitioner's App. A-76.) Ninety (90) days from that date was October 8, 1996. This petition was not filed until October 9. The mandate of the court, that the case be remanded to a due process hearing, was entered September 10, 1996 and is located at A-77 of Petitioner's appendix. This Petition was not timely filed.

STATEMENT

Respondent H.M. is a disabled African-American student who appealed the refusal of Petitioner Special School District No. 1 (hereinafter, "Petitioner SSD 1") and the Minnesota Department of Education/Department of Children, Families, and Learning (hereinafter, "MDE/MDCFL")[1] to grant his parents an administrative hearing concerning past educational services. The agencies claim H.M.'s parents are not entitled to a hearing on past educational services because at the time his parents requested a hearing, H.M. was involuntarily incarcerated at the Department of Corrections in Red Wing (hereinafter, "DOC"). There is no dispute that at all times, H.M.'s parents have resided and continue to reside in the Petitioner District. The Minnesota State Court of Appeals ordered the agencies to provide Respondent H.M. a hearing. The Minnesota State Supreme Court denied a request for certiorari. Petitioner has now filed a petition seeking certiorari from this Court. A review of the facts show that the Court should not grant Petitioner's request for certiorari and the case should, instead, be allowed to proceed before an administrative agency. It is necessary for the Court to understand some of the basic facts in this matter to fully determine the legal issues.

Respondent H.M. is now 19 years old; he was 17 when this dispute began.[2] Respondent H.M. has been a special education student, with speech and language difficulties, learning disabilities and related emotional problems. Respondent H.M. moved to Petitioner SSD 1's school district with his family in late 1990 and began attending public school within the district.

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[1] The Minnesota Department of Education is now a part of the Minnesota Department of Children, Families and Learning.

[2] H.M. was born October 28, 1977. Minn. §120.17, Subd. 1.

While attending Petitioner SSD 1's schools, Respondent H.M. was placed on an Individual Education Plan or "IEP"[3]. There is no dispute that Respondent H.M. is disabled and has been in need of special education services. Almost immediately since arriving in Minneapolis and attending school, however, Respondent H.M.'s parents have had concerns about the kind and amount of special education services Respondent H.M. was receiving from Petitioner SSD 1. Respondent H.M.'s parents continued to seek help for Respondent H.M. but due to inappropriate services he slowly began to become less and less concerned with school.

In March of 1995, Respondent H.M. was placed by juvenile court order at Second Chance Ranch in the Anoka-Hennepin School District. As his parents were disputing the IEP created for him there, Respondent H.M. was transferred to the Hennepin County Juvenile Center in April, 1995. The Hennepin County Juvenile Center is located within the geographic school district boundaries of Petitioner SSD 1 and is not under the control of the DOC.

In April of 1995, while Respondent H.M. was still incarcerated at the Hennepin County Juvenile Facility, Respondent H.M.'s parents obtained counsel to assist in seeking services for their son at the Facility. On May 3, 1995, counsel sent a letter on Respondent H.M.'s behalf to the MDE/MDCFL, the DOC, and the Hennepin County Probation Department concerning Respondent H.M.'s educational services while he was incarcerated at the Hennepin County Juvenile Facility. Respondent H.M.'s counsel requested a form of alternative dispute resolution unique to this area of law and specifically encouraged by legislative mandate, known as a

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[3] An IEP is a document which explains what special education services are to be provided to a child receiving special education services and how and where. H.M. was receiving special education services in Chicago prior to coming to Minneapolis.

conciliation conference. Minn. Stat. §120.172[4], §120.17, Subd. 3b(c), Minn. R. 3525.3700.

The Petitioner SSD 1 responded, providing an IEP, but no conciliation conference was held. Respondent H.M.'s parents objected to the proposed IEP and again requested conciliation. Finally, on May 19, 1995, a conciliation conference was held in the offices of Petitioner SSD 1, with their counsel present and with their participation. However, by this time, H.M. had been involuntarily transferred to the DOC, to a facility in another town, known as the Red Wing Correctional Facility. No resolution was reached at the conference.

On June 7, 1995, Respondent H.M.'s parents, who continued to reside in SSD 1, requested a special education due process hearing pursuant to state and federal law.[5] Two other families also made the same kind of request. (See, Petitioner's App. A-88, Thompson v. Special School District No. 1; A-100, W.S. v. Special School District No. 1) Respondent H.M. directed his hearing request at both the Petitioner SSD 1 and the DOC. The MDE/MDCFL was also specifically made aware of the hearing requests. Due process was requested in an attempt to resolve both present issues at the DOC and past failures of the Petitioner SSD 1 to provide a free appropriate public education to H.M. by the Petitioner SSD 1 and DOC. A Hearing Officer (HO) was appointed by the MDE/MDCFL and subsequently bifurcated the hearings between the two

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[4] The statute provides: "The legislature finds that conciliation conferences pursuant to section 120.17 serve better than formal hearings to promote communications between parents and school staff and to reach prompt, shared decisions about educational programs for children with a disability. Further, the legislature urges the United States department of education and the United States office of civil rights to acknowledge that the conciliation conference process violates no federal statute or regulation. Minn. Stat. §120.172, Subd. 1

[5] Minnesota has a two tier process for administrative resolution of special education disputes involving first a local due process hearing and then a state review. See, generally, Schuldt v. Mankato, 18 IDELR 16, 937 F. 2d 1357, (8th Cir. 1991).

agencies. The Petitioner SSD 1 then moved the HO to dismiss it from the proceedings.

The HO delayed the decision on the Petitioner SSD 1's motion to dismiss pending a decision in W.S. v. Special School District No. 1, which was in the midst of a purported interlocutory appeal. The propriety of that appeal is presently a matter in U.S. Federal District Court, where claims of discrimination, violations of civil rights and conspiracy are pending. (Petitioner's App. A-101, n 3) The SSD 1 in W.S. had moved to dismiss asserting that the student was no longer a resident of the district nor was he attending school in the district. A state appointed Hearing Review Officer (HRO) denied the student's right to a hearing on past educational services because W.S. had voluntarily moved out of the district. The HRO dismissed W.S.'s case on August 4, 1995.

On August 15, 1995, over two months after Respondent H.M.'s parents had made their written request for a hearing, the HO, apparently in reliance on the W.S. decision, granted the Petitioner SSD 1's motion to dismiss.

Respondent H.M. appealed the HO's decision to a HRO appointed by the MDE/MDCFL as part of the required two level administrative process for special education hearings in Minnesota. See, generally, Minn. Stat. §120.17, Subd. 3b. On September 20, 1995, the HRO issued an Order affirming the HO's order dismissing Respondent H.M.'s hearing. The HRO also based her decision, in part, on W.S..

Thereafter, Respondent H.M.filed an appeal in the Minnesota State Court of Appeals. On May 14, 1996, the Minnesota State Court of Appeals reversed and remanded the matter for hearing. The Petitioner SSD 1 filed for writ of certiorari to the Minnesota Supreme Court, which was denied on July 10, 1996. (Petitioner's App. A-76). At no time did the Petitioner SSD 1

request a stay of the order of the Minnesota State Court of Appeals or the Minnesota Supreme Court as required by 28 U.S.C. §2102(f). The hearing was scheduled to begin October 21, 1996. On October 21, 1996, this Court denied the request for a stay of that proceeding. (Respondent's App. A-1) On October 17, 1996, the hearing officer who first dismissed H.M.'s hearing granted an additional extension of time to Petitioner SSD 1. (Respondent's App. A-2) The hearing, first requested on June 7, 1995, and remanded by the Minnesota State Court of Appeals on May 14, 1996, has not yet commenced.

REASONS TO DENY THE PETITION

I. The Minnesota Court of Appeals Ruled Correctly and the Supreme Court Lacks Jurisdiction.

The jurisdiction of this Court is limited when questions arise in state courts. The jurisdiction of this Court over questions arising in state courts is pronounced at 28 U.S.C. §1257. That section provides, in relevant part, that

> [f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari *where the validity of a* treaty or *statute of the United States is drawn into question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution*, treaties, *or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of*, or any commission held or authority exercised under, *the United States.*(Emphasis added.)

28 U.S.C. §1257(a). The Petitioner raises the request for certiorari specifically under the Individuals with Disabilities Education Act, (hereinafter, "IDEA") 20 U.S.C. §1400 et seq., a federal law, and has not claimed a state law to be at issue. Because the State Court of Appeals

made a decision based on state law, however, the validity of the IDEA itself is not in question. No "title, right, privilege, or immunity" is being "specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." There is no inconsistency between the IDEA and the decision of the Minnesota State Court of Appeals in this case. Thus, the Court lacks jurisdiction to grant certiorari.

A. The State Court of Appeals Decision is Consistent with the IDEA.

There is no inconsistency between the IDEA and the decision of the Minnesota State Court of Appeals in this matter. The Minnesota State Court of Appeals decision holds

> "[W]e believe that a hearing is necessary, and was necessary... to determine whether the district must compensate H.M. for a past denial of the education to which he is entitled."
>
> "Under Minnesota law, H. M. is entitled to a due process hearing to address his claims for compensatory education from the district."

In the Matter of H.M. vs. Special School District No. 1 and Commissioner of Children, Families and Learning, C7-95-2204 (Minn. App. May 14, 1996) (Petitioner's App.A-67, 68)

The relevant portion of the IDEA sets out Congress' mandate concerning a child's right to an administrative hearing:

> 20 U.S.C. §1415(b) Required procedures; hearing
> (1) The procedures required by this section shall include, *but shall not be limited to--*
> . . .
> (E) an opportunity to present complaints with respect to *any matter* relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.
> (2) Whenever a complaint has been received under paragraph (1)

> of this subsection, *the parents or guardian shall have an opportunity for an impartial due process hearing* which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, *as determined by State law* or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child. (Emphasis added.)

There is nothing in the IDEA which addresses the issue of residency or the jurisdiction of hearing officers. The IDEA thus *specifically* leaves the issue of what entity shall conduct a hearing to the States. The Minnesota Court of Appeals decision examined state law and is necessarily one of *state law*, not one of federal law construction, because it addresses the issue of what entity must provide a hearing based upon an interpretation of Minnesota law. The decision is not inconsistent with the IDEA. The question decided does not have an effect on federal law but rather interprets it within the authority granted to the states under that federal law. Therefore, the United States Supreme Court lacks jurisdiction under 28 U.S.C. §1257 and should not grant certiorari pursuant to Rule 10C of the Supreme Court Rules.

B. The State Court of Appeals Decision is Consistent with Federal Court Interpretations of the IDEA, Including MN Federal Courts

The Minnesota Court of Appeals did not clash with the Federal Courts when it issued its unpublished decision in H.M.[6] The thrust of the Petitioner's argument, that there is conflict between the State Court of Appeals and the Eighth Circuit, relies on a 14 year old case, Monahan v. State of Nebraska, 687 F.2d. 1164 (8th Cir. 1982). Not only is Monahan old law and

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[6] While it is true that the H.M. decision is published in the Individuals with Disabilities Education Law Reporter, Petitioner provides no evidence whatsoever that the H.M. decision is being cited as binding precedent.

inconsequential in the case at bar, but the facts are very different. Likewise, the recent Federal Circuit Court cases the Petitioner cites, Thompson v. Special Sch. Dist. No. 1, 3-95-1083 (D. Minn. Filed July 31, 1996) and Smith v. Special Sch. Dist. No. 1, 4-96-685 (D. Minn. Filed August 12, 1996), are factually distinct from H.M. and also contain unfounded conclusions of law.

Monahan is old law. It came several years before Miener v. Missouri, 800 F.2d. 749 (8th Cir. 1986) and other important decisions which make clear that Congress intended that students who have been deprived a free appropriate public education ("FAPE") are entitled to a remedy, albeit a limited one. *See* Florence County Sch. Dist. Four v. Carter, 114 S. Ct. 361, __ U.S.__ (1993), School Committee of Burlington v. Department of Educ., 471 U.S. 359, 105 S. Ct. 1996 (1985), Lester H. v. Gilhool, 916 F.2d 865 (3rd Cir. 1990), Burr v. Ambach, 863 F.2d 1071 (2nd Cir. 1988), vacated and remanded on other grounds *sub nom*, Sobol v. Burr, __ U.S. __, 109 S. Ct. 3209 (1989), reaff'd, 888 F.2d 258 (2nd Cir. 1989), *cert. denied*, __U.S. __, 110 S. Ct. 1298 (1990), Jefferson County Bd. of Educ. v. Breen, 853 F.2d 853 (11th Cir. 1988).

It is critical to the disposition of this case that the Court review the progeny of seminal cases on remedies under the IDEA. The Eighth Circuit, in Miener v. State of Missouri, 673 F.2d. 969 (8th Cir.), cert denied, 459 U.S. 909, 74 L.Ed.2d. 171, 103 S. Ct. 215 (1982) ("Miener I"), denied monetary damages to a disabled student, reasoning that Congress did not intend such a remedy under the IDEA. In 1985, however, this Court first affirmed the availability of a monetary remedy in Burlington, *supra*, holding that public schools could be ordered to pay tuition reimbursement to parents who placed their children in private schools, at their own expense, because they were not receiving a free appropriate public education in the public

school. Just one year later, in Miener v. State of Missouri, 800 F.2d 749 (8th Cir. 1986), "Miener II", the Eighth Circuit re-examined the issue in light of Burlington. The Court extended the Burlington theory to a second type of remedy, known as compensatory education, for children whose parents lacked deep pockets and who therefore could not be provided private schooling while their parents disputed public school programming. In Miener II, the parent contended that he did not have the money to pay for an appropriate form of education for his daughter during the time of the dispute, and thus had to place her in what he conceded was not an appropriate placement. The parent then sought to recover the educational services that the child should have received during a three-year period, services that the parent could not provide and that the defendant school district and state department were unwilling to provide. Miener II held that:

> We cannot agree with the defendants that they should escape liability for these services simply because Clyde Miener was unable to provide them in the first instance; we believe that such a result would be consistent neither with Burlington nor with congressional intent. Like the retroactive reimbursement in Burlington, imposing liability for compensatory educational services on the defendants "merely requires [them] to belatedly pay expenses that [they] should have paid all along," 105 S. Ct. At 2003. Here, as in Burlington, recovery is necessary to secure the child's right to a free appropriate public education. Id. We are confident that Congress did not intend the child's entitlement to a free education to turn upon her parent's ability to "front" its costs." Miener II, at 753.

The Lester H. court explained the Miener court's reasoning this way, "compensatory education, like tuition reimbursement, cures the deprivation of a handicapped child's statutory rights, *thus providing a remedy which Congress intended to make available.*" Lester H., 916 F.2d at ___ (3rd Cir. 1990), *citing*, Miener, 800 F.2d at 753 (8th Cir. 1986)(emphasis added).

The fact that H.M. was not in "attendance in the district should not be dispositive of this

issue [of when a district must follow the procedural requirements of the IDEA]." Evans v. Dist. No. 17 of Douglas Co., 841 F.2d 824, 829 (8th Cir. 1988). In Evans the Eighth Circuit Court of Appeals stated that a child in a private placement was still entitled to due process protection under the IDEA pursuant to 34 C.F.R. §300.403(b). H.M.'s situation was more similar to that of a child placed in a private school than to one who voluntarily moved out of the District as was the case in Monahan. Because H.M. was only temporarily out of the district, and his parents remained there, he is entitled to the due process protections of the IDEA just as a child in private placement would be.

The Petitioner argues that recent Federal Circuit Court cases in Minnesota display an inconsistency between the decision in H.M. and the Federal Courts. The fact is, the cases cited by the Petitioner, Thompson, 3-95-1083 (D. Minn. Filed July 31, 1996) and Smith, 4-96-685 (D. Minn. Filed August 12, 1996) are not at all similar to the facts in H.M. H.M. was a student who lived with his family within the Petitioner school district at all times except when he was involuntarily placed in juvenile correctional facilities. In Smith, the student's family had voluntarily moved to another school district. This fact alone marks a clear distinction between the cases because H.M.'s family never moved. Additionally, H.M. is again living with his family in the district, and Petitioner is, without question, responsible for providing him a FAPE and due process.

While Thompson contains a different factual scenario than H.M., its distinction rests more on legal grounds. The court in Thompson focused on the fact that the student was seeking "damages." "Courts have recognized that a claim for compensatory educational services is available to remedy the denial of FAPE." Thompson, 3-95-1083 (D. Minn. Filed July 31,

1996)(A-89), *citing* Burlington, 471 U.S. 359, 369 (1985) and Miener, 800 F.2d 749 (8th Cir. 1986). The court stated, however, that there was no basis for an award of damages for a denial of FAPE. Id. (A-90). The court goes on to mention "educational malpractice" and that there is no such claim. Id. However, the Court never fully explained whether its tenuously supported theory of "educational malpractice" prohibited a claim for compensatory education as well as damages. It is clear, however, that compensatory education, like tuition reimbursement, is not a "damage" award to a claim of "educational malpractice" but is a remedy to a failure to provide a FAPE, something the District was required to provide all along. *See* Burlington, 471 U.S. at 370-71, (1985); Miener, 800 F.2d at 753 (8th Cir. 1986) . The court in Thompson steered clear of directly contradicting the Eighth Circuit and this Court and did not specifically say that there can be no claim for compensatory education, regardless of where the child is currently attending school.

The Thompson court actually supports H.M.'s claim for compensatory education (and necessarily a right to hearing) in its discussion about the procedural safeguards provided at 20 U.S.C. §1415(b), Thompson, (A-90, 91). While the Thompson court rejected the right of a student to bring an action for damages against a former school district, it supported a claim for the remedy of compensatory education. The court adopted language from the Seventh Circuit case of Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981): "a parent could bring any matter 'concerning the educational situation of his child. . . in order to obtain *the appropriate educational placement*.'" Thompson, *citing* Anderson, 658 F.2d at 1211. H.M. requested a hearing to challenge the services he had been receiving (or lack thereof) from the Minneapolis School District. It is immaterial that he was temporarily placed outside of the District by another

agency. His family remained there and he was destined to, and in fact did, return to school there. This scenario very closely resembles one in which a child is placed in a private placement by her parents but still has due process rights with respect to the district the child had attended prior to the private placement. Even more compelling is the fact that H.M. was most definitely likely to return to the District, and did, upon being released from the correctional facility. A child in a private placement is conceivably less likely to return because they have voluntarily left. The Minnesota Court of Appeals recognized these differences and issued its unpublished decision granting H.M. a hearing. The decision was, as the court recognized, very factually distinct and in no way contradicts any valid federal court interpretations of the IDEA. Therefore there is no basis for Supreme Court review.

II. The Supreme Court Should Not Intrude on Minnesota's Interpretation of State Law.

The Supreme Court should not review this case because it is ultimately a question of state law interpretation. The IDEA is specific on minimal due process requirements and leaves the rest to the states. 20 U.S.C. §1415(b)(2). At question are state law provisions for alternative dispute resolution, limits on issues that can be heard in a due process hearing, and state residency issues.

A. Minnesota's ADR System Must Be Interpreted Consistently with the IDEA.

The Petitioner knew that H.M.'s parents were dissatisfied with the services their son was receiving long before he went to Red Wing. In fact, the parents had already requested a conciliation conference in May, 1995 to attempt to resolve the dispute with the district amicably and consistently with Minnesota's ADR process. H.M. was in Minneapolis at a county detention

center where the Petitioner had the responsibility, under state law, to provide a FAPE at that time. The Petitioner delayed a request to conciliate and thus, by the time H.M. demanded a hearing, he had been involuntarily moved to Red Wing.

Congress stated the purpose of the IDEA is to

> assure that all children with disabilities have available to them, within the time periods specified in Sec. 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities *and* their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities. (Emphasis added.)

20 U.S.C. §1400(c). The United States Department of Education, Office of Special Education Programs, has referenced the appropriateness of alternative dispute resolution in these kinds of cases. 34 C.F.R. §300.506 contains the following notation:

> Note: Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes concerning the identification, evaluation, and educational placement of children with disabilities, and the provision of FAPE to those children. Mediations have been conducted by members of SEA or LEA personnel who were not previously involved in the particular case. *In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent's rights under Secs. 300.500-300.515.* (Emphasis added.)

Minnesota's preference for alternative dispute resolution is supported by this legislation because it is often quicker, cheaper and ultimately in the best interests of the children when resolving disputes over FAPE. If H.M. will not be provided a hearing because he was *involuntarily*

removed temporarily from the District while he was attempting to resolve his dispute through conciliation, then the purpose of both state and federal law is thwarted. Students and their parents should be rewarded, not penalized, for attempting to resolve disputes through alternative dispute resolution. To permit this district to deny a hearing by claiming that it was no longer responsible for H.M.'s education by virtue of the fact that he was involuntarily moved out of the district while he was attempting to conciliate the matter is not a result intended by Congress.

Nor is this result consistent with Minnesota state law. Minnesota state law provides for alternative dispute resolution when questions about the provision of FAPE arise between parents and school districts. Minn. Stat. §120.17 Subd. 3b(c) clearly states that:

> "...[p]arents and guardians shall have an opportunity to meet with appropriate district staff in at least one conciliation conference, mediation, or other method of dispute resolution. . . . The conciliation process or other form of alternative dispute resolution shall not be used to deny or delay a parent or guardian's right to a due process hearing."

The Minnesota legislature has affirmatively endorsed this mechanism of alternative dispute resolution, providing that:

> "**Subd. 1. Policy statement**. The legislature finds that *conciliation conferences pursuant to section 120.17 serve better than formal hearings* to promote communications between parents and school staff and to reach prompt, shared decisions about educational programs for children with a disability. Further, the legislature urges the United States department of education and the United States office of civil rights to acknowledge that the conciliation conference process violates no federal statute or regulation.
>
> ***Subd.2. State plan***. The state board of education shall not adopt any provision in the state plan for special education which reduces the opportunity for parents and school districts to resolve their differences through conciliation. Minn. Stat. §120.172. (Emphasis added.)

The Court should reject any argument of Petitioner that H.M. and his parents are not and were

not entitled to bring issues to a formal due process hearing, just because while he was attempting to utilize the legislatively preferred conciliation conference process, he was involuntarily moved out of SSD 1.

B. A Request for Compensatory Education is a Hearable Issue Under Both Minnesota and Federal Law.

The H.M. decision is consistent with state law because the request for due process was based on a request for compensatory education which is a proposed provision of services that have been denied. Minn. Stat. §120.17 Subd. 3b(e) states that a due process hearing will be provided when a parent objects to "the proposed denial or removal of special education services for their child." Minn. Stat. §120.17 Subd. 3b(e)(5). H.M.'s parent sought additional special education services for him in the form of compensatory education. The District has yet to agree to this and so there is a "denial" of certain special education services. The Minnesota Court of Appeals rejected "the distinction between "proposed" and "retroactive" services in the context of compensatory education." H.M. (A-67). The Court explained that a claim for compensatory education could be construed as a proposed action because the student is seeking services to be provided in the future. Id. This is sound and logical reasoning. Minn. Stat. §120.17 may, in fact, violate the IDEA by unduly limiting what issues may be brought to a due process hearing. The Minnesota Court of Appeals surely considered this and ruled accordingly by interpreting the state statute in a way that conformed with the federal law. In any event, the Minnesota State Court of Appeals decision is again essentially an interpretation of state law and thus is not a basis for United States Supreme Court review.

C. Residency Is Clearly a Question of State Law.

The issue of residency and what agency or entity must provide a due process hearing is solely a question of state law. The IDEA, as mentioned, specifically leaves this to the states.[7] 20 U.S.C. §1415(b)(2). Disputes about the interpretation of state law are best left to the purview of the state courts. Specifically, the chief question upon which the petition is based is whether or not H.M. was a resident or otherwise entitled to a due process hearing from the District at the time of the request for same. The IDEA does not address this so it is left to the states. In Minnesota there is a genuine question about state law construction on this point. For example, Minnesota Rule 3525.2325, Subp. 1(D) provides that the Minnesota Department of Corrections is the school district for students placed in that agency's care. The extent of that authority is in question, however. The District has argued that since the Department of Corrections (DOC) is "the district" it is responsible for all due process procedures, including hearings, for special education students placed with it. Minnesota Statute is not entirely clear on this point, however, and it is questionable that Petitioner can escape all responsibility for due process for its students placed with the DOC. Minn. Stat. §120.17 Subd. 7 provides:

> Responsibility for special instruction and services for a child with a disability placed in a state institution on a temporary basis shall be determined in the following manner:
>
> (a) The legal residence of such child shall be the school district in which the child's parent resides, . . .

---

[7] Catlin v. Sobol, 93 F.3d 1112, 24 IDELR 767, (Second Cir. 1996), [previously reported at 17 EHLR 686, and 22 IDELR 691] after receiving interpretation of state courts, holding that New York residency statute did not violate the IDEA, because under the statute there was a presumption that the district of the parent's actual residence remained responsible for the child's education, regardless of where the child actually lived, absent parental abandonment.

There is no statutory authority for Petitioner's contention that it was not the responsible district at all times, even while H.M. was in the DOC facility at Red Wing. DOC may have been responsible for providing the instruction but Petitioner was responsible for assuring a FAPE was provided and that due process procedures were followed. In Minnesota, according to state special education law, more than one district can be involved in a child's educational life. As the Court of Appeals correctly explained, citing Minn. Stat. Sec. 120.17, Subd. 6a:

> Finally, we note that the legislature has named the individuals and entities that may be parties to a due process hearing. Those parties include "[t]he child's school district of residence, a resident district and providing district ***"Id., subd. 6a. "School district of residence" is defined as "the district in which the child's parent resides**** *Id.*, Subd. 6 (a). During H.M.'s placement at Red Wing, his parents continued to reside in the district. (Petitioner's App. A-68.)

This statutory scheme is consistent with standard residency theory. For example, in determining domicile for tax purposes the court must look at where the individual resides in fact as well as the individual's intention of making that residence a home. Texas v. Florida, 306 U.S. 398, 424 (1939). H.M. did not lose his residency in Minneapolis simply because he was temporarily and *involuntarily* removed to a correctional facility in Red Wing. There is no basis for Petitioner's long standing argument that it was relieved of its duty to H.M. during that period. Most important for this Court, however, is that this question remains one with which Minnesota and Minnesota alone must grapple. It is not a basis upon which certiorari can or should be granted.

Parents and students must be able to bring hearings against all involved entities. The Petitioner asserts that the purpose of the IDEA would be violated if more than one school district is joined to a due process hearing. Borrowing the theory of joint and several liability from tort

law, Petitioner may be held accountable for its failures even if the DOC was responsible for the provision of services during the time H.M. was *involuntarily* incarcerated. Under Minnesota tort law, all defendants who are potentially liable may be joined procedurally as defendants in a plaintiff's claim. Kleidon v. Glascock, 10 N.W.2d 394 (Minn. 1943). Even in cases where the acts of multiple tortfeasors were successive in time they may be held jointly and severally liable. Tolbert v. Gerber Indus. Inc., 255 N.W.2d 362 (Minn. 1977). The reason for this is to assure that a full recovery is made, whether it is apportioned or is provided entirely by one of the defendants. So likewise, when a school district is alleged to have denied a student FAPE, but is no longer responsible for the provision of FAPE, it may be necessary to join that district in a due process action. If it is not joined, the current district may be asked to show that another district provided the child a FAPE, an obviously absurd proposition. If the student were limited to only asking whether the current district has provided FAPE, the purpose of the IDEA would be thwarted. The current district may show that it has provided FAPE and so no award of compensatory education would be warranted. However, the student may have suffered genuine harm in being denied FAPE by the former district but is precluded at that point from receiving a remedy to that harm. This is not a result Congress intended because it fails to hold districts accountable for their duties under the IDEA and allows disabled children to slip through the cracks and not receive the FAPE they are entitled to and should receive. Therefore, if the theory of joint and several liability is employed, the purpose of the IDEA is met.

Various courts have permitted more than one entity, whether it be a state educational agency or a local educational agency, to be joined as a party to this type of litigation. In Doe by Gonzales v. Maher, 793 F.2d. 470, 1492 (9th Cir. 1986), *aff'd as modified on other grounds*, 485

U.S. 305 (1988), the Ninth Circuit established a three-prong test to determine when a state educational agency, in addition to a school district, may be a party to litigation involving a special education student. See also, Moubry v. ISD 696 and Minnesota Department of Education, No Parallel Citation, 24 IDELR 119 (D. Ct.MN 1996) (holding that state agency could bear ultimate responsibility if local educational agency failed student); Hill v. Laurel, No Parallel Citation, 22 IDELR 489 (S.D. Mississippi 1995) (finding that state agency could be implicated depending on factual determinations concerning local educational agency.) At least one court has considered who must be a party to an administrative hearing and concluded that there can, indeed, be more than one entity responsible for the child's education. In Randolph Union High School Dist. No. 2 v. Byard, No Parallel Citation, 22 IDELR 617 (D. Vt. 1995), the Court was asked whether the student had failed to exhaust administrative remedies by not naming individual teachers as "parties" at the administrative hearing level; in answering the question, the Court correctly noted that:

> In determining who must be a party to an administrative proceeding, the Court should look to the purpose and effect of the proceeding and the particular statute under which it is brought. See, e.g., Whitehouse v. Illinois C.R. Co., 349 U.S. 366, 370 (1955). The purpose of an IDEA administrative hearing is to ensure that children with disabilities receive an appropriate education. 34 C.F.R. § 300.1. *Because each State is responsible for providing a FAPE to its children, all political subdivisions of the State that are involved in the education of children with disabilities are subject to the IDEA. 34 C.F.R. § 300.2. Therefore, state educational agencies ("SEA"), local educational agencies ("LEA"), and intermediate educational units ("IEU") are appropriate parties to an IDEA administrative hearing. 20 U.S.C. § 1415(a).*

See, also, Unified School District No. 1, 22 IDELR 600, (SEA CT 1995), (recognizing need for due process hearing against both home district and district of incarceration of pretrial detainee.)

In this instance, the purpose and effect of the proceeding requested in June of 1995 was

to resolve H.M.'s current educational services at the time, and to determine whether he was entitled to prior services for the failures of SSD 1. Obviously, it would have been more efficient to have a joint hearing, with both entities and to resolve both past and current services at a time more recent to the dispute. That did not occur because the hearing officer dismissed the case as to SSD 1 and the litigation leading to this request for certiorari followed. That was short-sighted. As the state hearing officer in Loudon County Pub. Schs., 22 IDELR 833 (SEA Virginia 1995) found, jurisdiction continues over the district initially involved even when the student voluntarily transferred to a different school district than was the subject of the proceeding because the father maintained a residence in the original district. In Loudon, as the administrative hearing officers should have done here, the hearing officer recognized that there was a likelihood that the child might re-enroll, making the issue capable of repetition. Here, H.M. was *involuntarily* transferred out of the district, during the time he was attempting to resolve matters through a conciliation conference process, and, as the State Court of Appeals noted, returned before the matter was even decided by that court. Clearly, more than one agency, and even a former agency, can be responsible for a child's education.

Most significantly, this question involves primarily an interpretation of state law. There is no apparent conflict with federal law because the IDEA specifically leaves this discussion to the states. The H.M. decision upheld H.M.'s right to a hearing as against SSD 1 and so is not in conflict with the IDEA. The Supreme Court should deny review.

IV. The Question Presented, While Important, Needs No Further Interpretation From This Court.

There can be no doubt that questions concerning the provision of education to our

children are important questions. However, as discussed, the question presented is one regarding state law rather than federal law. For the following additional reasons this Court need not review this question.

A. The Minnesota Court of Appeals Decision Supports IDEA's Purpose of Fully Informed Parents.

In addition to cheap and informal conciliation and alternative dispute resolution processes as discussed above, the H.M. decision supports the IDEA's goal of informing parents of their rights with regard to special education services provided pursuant to the IDEA. 20 U.S.C. §1415(b)(1)(D) provides that states must have

> procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section, . . .

This section is an implementation of the purpose of the IDEA stated in 20 U.S.C. §1400(c). The decision in H.M. supports that purpose by notifying districts that they cannot escape their duty to provide FAPE when students are temporarily removed from the district. As explained by the Second Circuit Court of Appeals,

> We do not believe that Congress intended to create a right without a remedy. If, in this case, we do not allow an award of compensatory education, then Clifford's right to an education between the ages of three and twenty-one is illusory. Clifford cannot go back to his previous birthdays to recover and obtain the free education to which he was entitled when he was younger.

Burr v. Ambach, 863 F.2d 1071, 1078 (2nd Cir. 1988), vacated and remanded on other grounds sub nom, Sobol v. Burr, __ U.S. __, 109 S. Ct. 3209 (1989), reaff'd, 888 F.2d 258 (2nd Cir. 1989), cert. denied, __U.S. __, 110 S. Ct. 1298 (1990). Likewise, H.M.'s right to FAPE will be

illusory if he is denied a due process hearing on issues of FAPE before he went to Red Wing. The H.M. Court was correct in remanding the case to a due process hearing. The Court let it be known that school districts cannot escape their duty to provide FAPE when parents are not fully informed of their rights. This decision represents an affirmation of the IDEA's intent to require districts to inform parents and follow due process procedures for the benefit of children with disabilities.

B. The Minnesota Court of Appeals Decision Will Not Result in Any Particularly Great Fiscal Burden on School Districts.

The Petitioner alleges that if the H.M. decision is permitted to stand then school districts across the country will be besieged by due process requests from parents and students who long ago ceased to attend those schools. This is a preposterous scare tactic. There is no evidence to suggest that such an event would occur. Looking at the history of judicial interpretations of the IDEA reveals that such predictions have proven to be mythical. When the Court announced its decision in Burlington that tuition for private schools could be reimbursed in certain instances there was no flood of requests to school districts to pay up. As recently as 1993, the Supreme Court reaffirmed the duty of school districts in Florence when it stated that

> public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.

Florence County Sch. Dist. Four v. Carter, 114 S. Ct. at ___ (1993). By providing FAPE in the first instance schools will not face a large number of due process requests. It has not happened yet and the case is unpublished so it does not lend itself to support claims by others. This

assertion by Petitioner is simply without merit. Even assuming *arguendo* that schools would face an increase in due process requests, it remains the burden of the school districts to provide for these children in the first instance, as Florence County declared, thus avoiding the later liability for failure to do so.

C. The Court Has Already Ruled on the Right to Hearing

Petitioner asserts that the Court should grant certiorari because this is a case of first impression. That is not exactly the case. In Honig v. Doe, 108 S.Ct. 592 (1988) this Court addressed a similar question, whether or not a claim against a school district was moot. The two disabled students in the Honig case had filed suit objecting to exclusion procedures used against them by their respective schools. At the time the case came before the Supreme Court one student, Doe was 24 years old and "no longer entitled to the protections and benefits of the [IDEA], . . ." Id at 601. Therefore, the Court reasoned, the case was moot as to him. The other student, Smith, had moved out of the district but was still in the state. He was still eligible for service under the IDEA because he was 20. Therefore the Court concluded, the case was not moot as to Smith because based upon the state policy, he could be faced with expulsion again in the future, even if living in another district. While Honig did not involve a claim for compensatory education it provides guidance about when a disabled student is entitled to due process from a school district. Smith was permitted to maintain a claim against his former school district because he remained a resident of the state, he remained of eligibility age and it was possible he could be placed in that district again. This Court found that a claim was viable against a former school district even though the student no longer lived in that district. This same theory works with the facts here, because H.M. could, and in fact, did, return to the district,

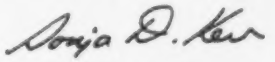
so his due process claim should not have been dismissed. The theory works and there is no need for this Court to revisit the question.

CONCLUSION

The Supreme Court should deny the Petition for Certiorari. The Petitioner fails to meet any basis for granting of certiorari. The state statute has been interpreted by the Minnesota State Court of Appeals consistent with the dictates of the Individuals with Disabilities Education Act. The State of Minnesota has the final word on what is, essentially, a state law question. The State Court of Appeals has ruled and this Court should not intrude on the State's province.

Dated: November 12, 1996

Respectfully submitted,



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2. Letter of October 17, 1996 from Administrative Law Judge Mihalchick Granting a Continuance of the Administrative Hearing.....RA-2

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

October 21, 1996

Ms. Sonja Kerr
5972 Cahill Avenue
Suite 110
Inver Grove Heights, MN 55076

Re: Special School District No. 1
v. H. M.
Application No. A-280 (96-604)

Dear Ms. Kerr:

The application for a stay of the proceedings below in the above-entitled case has been presented to Justice Thomas, who on October 21, 1996 denied the application.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By Cynthia Rapp

Cynthia Rapp
Assistant Clerk

BEST AVAIL

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
100 Washington Square, Suite 1700
100 Washington Avenue South
Minneapolis, Minnesota 55401-2138

October 17, 1996

BY FAX AND MAIL

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RE: In the Matter of H.M. v. Special School District No. 1;
OAH Docket No. 12-2104-9817-3.

Dear Counsel:

This letter is in response to your request in letters of the last several days. I apologize for not responding more quickly, but I was unable to do so.

Ms. Kerr's request to allow Mr. Arthurs to represent the Student and parents at the hearing is granted. There is no requirement under IDEA or Minn. Stat. § 120.17 for representation only by an attorney.

I am also granting the School District's request to reschedule the hearing to a later date and extend the 45-day deadline. The School District has shown good cause for the extension in that Dr. Ortega is unavailable due to a medical emergency in his family. I understand from the School District that he is both an important witness and the coordinator of other witnesses. Therefore, I am extending the commencement date of the hearing to November 19, 1996. I note that Ms. Kerr has suggested that the hearing may last as long as ten days. While I understand that this is a case that now involves a claim for compensatory education, I will not expect the School District to review in detail the services it provided to the Student over a five-year period. I expect to deal only with specific issues the parents identify as inadequacies in the School District's delivery of a free appropriate public education to the Student. I expect that that can be handled in much less than ten days of hearing, but will reserve the entire week of November 18, 1996. If the hearing is conducted as scheduled, the Student and parents can expect a decision by December 13, 1996.

Sincerely,

STEVE M. MIHALCHICK
Administrative Law Judge
Telephone: 612/349-2544

SMM:lc

cc: Phyllis A. Reha
Docket Clerk

ABLE COPY